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NOTES

Cults, Deprogrammers, and the Necessity Defense

As membership in religious "cults"¹ has increased dramatically during the last decade,² public concern for the welfare of cult members, who are largely young adults,³ has also risen apace.⁴ As a result, many parents have taken drastic action to protect their children from these groups. Some parents have gained temporary legal control over their children,⁵ but attempts to work within the legal system

1. In *Peterson v. Sorlien*, 299 N.W.2d 123, 126 (Minn. 1980), *cert. denied*, 450 U.S. 1031 (1981), the Minnesota Supreme Court stated: "The word 'cult' is not used pejoratively but in its dictionary sense to describe an unorthodox system of belief characterized by '[g]reat or excessive devotion to some person, idea, or thing.'" (citing WEBSTER'S NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 552 (1976)).

2. Some authorities suggest that over 3000 cults operate in the United States, *see, e.g.*, Clark, *Cults*, 242 J. A.M.A. 279 (1979); Levine, *The Case for Deprogramming Religious Cult Members*, SOCIETY, Mar.-Apr. 1980, at 34, 38, with membership estimates ranging from several hundred thousand to several million. Rudin, *The Cult Phenomenon: Fad or Fact?* 9 N.Y.U. REV. L. & SOC. CHANGE 17, 18-19 (1980). *See generally* J. MACCOLLAM, *CARNIVAL OF SOULS* 174-75 (1979).

3. The great majority of cult members are between 18 and 25 years old. J. MACCOLLAM, *supra* note 2, at 52.

4. Critics charge that many cults recruit members deceptively, and then employ various techniques to ensure the members' complete obedience to the leaders' will. Once this loyalty is obtained, members adopt a rigidly proscribed lifestyle, which includes long hours devoted to fundraising and recruiting. *See* Galanter, Rabkin, Rabkin & Deutsch, *The "Moonies": A Psychological Study of Conversion and Membership in a Contemporary Religious Sect*, 136 AM. J. PSYCH. 165, 167 (1979) (members worked an average of 67 hours per week, compared to 41 hours before joining); Rudin, *supra* note 2, at 27 (cult followers sometimes work eighteen to twenty hours a day, seven days a week).

For critical analyses of cults, *see* Delgado, *Religious Totalism: Gentle and Ungentle Persuasion Under the First Amendment*, 51 S. CAL. L. REV. 1 (1977); LeMoult, *Deprogramming Members of Religious Sects*, 46 FORDHAM L. REV. 599 (1978); Note, *High Demand Sects: Disclosure Legislation and the Free Exercise Clause*, 15 NEW ENG. L. REV. 128 (1979); Comment, *Piercing the Religious Veil of the So-Called Cults*, 7 PEPP. L. REV. 655 (1980). Cults have been more favorably assessed in DeSocio, *Protecting the Rights of Religious Cults*, 8 HUMAN RIGHTS 38 (1979); Note, *Legal Issues in the Use of Guardianship Procedures to Remove Members of Cults*, 18 ARIZ. L. REV. 1095 (1976); Comment, *"Mind Control" or Intensity of Faith: The Constitutional Protection of Religious Beliefs*, 13 HARV. C.R.-C.L. L. REV. 751 (1978); Note, *Deprogramming Religious Cultists*, 11 LOY. L.A. L. REV. 807 (1978); Note, *Conservatorships and Religious Cults, Divining a Theory of Free Exercise*, 53 N.Y.U. L. REV. 1247 (1978); Comment, *The Deprogramming of Religious Sect Members: A Private Right of Action Under Section 1985(3)*, 74 NW. U. L. REV. 229 (1979); Note, *People v. Religious Cults: Legal Guidelines for Criminal Activities, Tort Liability and Parental Remedies*, 11 SUFFOLK L. REV. 1025, 1048 (1977); Note, *Abduction, Religious Sects and the Free Exercise Guarantee*, 25 SYRACUSE L. REV. 623 (1974). Both sides of the debate are thoroughly discussed in the articles in *Colloquium — Alternative Religions: Government Control and the First Amendment*, 9 N.Y.U. REV. L. & SOC. CHANGE 1 (1980).

For a thorough annotated bibliography of published and unpublished literature relating to cults, *see* T. ROBBINS, *CIVIL LIBERTIES, "BRAINWASHING" AND "CULTS"* (1979).

5. *See* text at notes 197-98 *infra*.

have frequently failed.⁶ Frustrated by the perceived inadequacy of legal alternatives, other parents have hired "deprogrammers,"⁷ who abduct children from cults and confine them for several days of treatment.⁸ Although precise figures are unavailable, some evidence suggests that the number of deprogrammings runs into the thousands.⁹

Efforts by cult members to obtain legal protection against deprogramming have yielded mixed results.¹⁰ Deprogrammers prosecuted for kidnapping or false imprisonment have relied on the ne-

6. Criminal actions brought against cult leaders have been unsuccessful. *See People v. Murphy*, 98 Misc. 2d 235, 413 N.Y.S.2d 540 (Sup. Ct. 1977). After hearing testimony by a cult member's mother explaining her reason for deprogramming her daughter, a grand jury voted not to indict the participants in the deprogramming. The grand jury instructed the district attorney's office to continue its investigation into the activities of the cult (the Hare Krishna), which eventually led to this criminal case. The defendants, leaders of the cult, were acquitted.

Civil actions against cult leaders have also failed. *See, e.g., Turner v. Unification Church*, 473 F. Supp. 367 (D.R.I. 1978), *aff'd*, 602 F.2d 458 (1st Cir. 1979) (suit alleging that cult had, among other things, conspired to hold plaintiff in peonage and involuntary servitude was dismissed for failure to state a claim). Courts have rebuffed attempts to "free" children with habeas corpus petitions. *See Helander v. Unification Church*, 1 Fam. L. Rep. 2797 (D.C. Super. Ct. 1975).

7. For a description of deprogramming from the point of view of the most active and controversial deprogrammer in the United States, see T. PATRICK & T. DULACK, *LET OUR CHILDREN GO!* (1976).

8. Ted Patrick claims, "All deprogramming is talk — a lot of talk. It only lasts two or three days." *Id.* at 77. Others have suggested that the techniques used by deprogrammers are "like the Gestapo." *Abducted woman tells of horror of brainwashing*, Cath. Reg. (Toronto), Mar. 22, 1975, at 1, col. 2, 3, *reprinted in* *Deprogramming: Documenting the Issue 72* (1977) [hereinafter cited as *Deprogramming: Documenting the Issue*] (a collection of documents prepared by Herbert Richardson for the American Civil Liberties Union and the Toronto School of Theology Conferences on Religious Deprogramming) (copy on file with the *Michigan Law Review*). In some cases, after spending several days in "intensive deprogramming sessions in a physically confined setting," the deprogrammed youth may be sent to a rehabilitation center for several weeks. Kim, *Religious Deprogramming and Subjective Reality*, 40 SOC. ANALYSIS 197, 204 (1979).

9. *See Delgado, supra* note 4, at 80 ("approximately 1,000 deprogrammings have been attempted in the last few years"); *Panel Discussion: Regulation of Alternative Religions by Law or Private Actions: Can and Should we Regulate?*, 9 N.Y.U. REV. L. & SOC. CHANGE 109, 117 (1980) [hereinafter cited as *Panel Discussion*] (statement of Jeremiah Gutman) (estimating that thousands of people have been deprogrammed, and pointing out that Ted Patrick claims to have participated in approximately 1600 deprogrammings).

10. Tort actions were unsuccessful in *Weiss v. Patrick*, 453 F. Supp. 717 (D.R.I.), *aff'd*, 588 F.2d 818 (1st Cir. 1978), *cert. denied*, 442 U.S. 929 (1980) (cult members claim that deprogrammers had conspired to deprive her of civil rights and actions based on assault and battery and false imprisonment dismissed because of absence of evidence of compulsion); *Baer v. Baer*, 450 F. Supp. 481 (N.D. Cal. 1978) (motion for partial summary judgment granted against cult member claiming deprivation of civil rights because of absence of evidence of state involvement); *Peterson v. Sorlien*, 299 N.W.2d 123, 128 (Minn. 1980), *cert. denied*, 450 U.S. 1031 (1981) (false imprisonment action against parent dismissed because the child's conduct, after several days of deprogramming, demonstrated consent to the restraint, and this consent "relates back" to her initial confinement). However, in *Rankin v. Howard*, 457 F. Supp. 70 (D. Ariz. 1978), *rev'd*, 633 F.2d 844 (9th Cir. 1980), the court denied in part the defendants' motion for summary judgment in an action by a cult member alleging interference with his civil rights. Motions to dismiss were denied in similar actions. *See Ward v. Connor*, 657 F.2d 45 (4th Cir. 1981); *Cooper v. Molko*, 512 F. Supp. 563 (N.D. Cal. 1981); *Augenti v. Cappellini*, 84 F.R.D. 73 (M.D. Pa. 1979); *Mandelkorn v. Patrick*, 359 F. Supp. 692 (D.D.C. 1973).

cessity defense,¹¹ which has traditionally exculpated defendants who violated a law to avoid a greater evil than the law was designed to prevent.¹² In deprogramming cases, the defense has proceeded in two stages. Defendants argue first that the parents reasonably believed deprogramming necessary to protect their child from physical and psychological harm.¹³ Deprogrammers then claim that they, as the parents' agents, should also benefit from the parents' defense because few parents could protect their children without assistance.¹⁴ The courts have split on the legitimacy of this defense.¹⁵

11. See generally Arnolds & Garland, *The Defense of Necessity in Criminal Law: The Right to Choose the Lesser Evil*, 65 J. CRIM. L. & CRIMINOLOGY 289 (1974); Glazebrook, *The Necessity Plea in English Criminal Law*, 30 CAMBRIDGE L.J. 87 (1972); Hawkins, *Necessity as a Statutory Defense in Texas: A Comparison with Other States*, 3 AM. J. CRIM. L. 233 (1975); Huxley, *Proposals and Counter Proposals on the Defence of Necessity*, 1978 CRIM. L. REV. 141; Sullivan, *The Defense of Necessity in Texas: Legislative Invention Comes of Age*, 16 HOUS. L. REV. 333 (1979); Tiffany & Anderson, *Legislating the Necessity Defense in Criminal Law*, 52 DEN. L.J. 839 (1975); Williams, *Necessity*, 1978 CRIM. L. REV. 128; Note, *Necessity as a Defense*, 21 COLUM. L. REV. 71 (1921); Case Note, 13 SW. L.J. 265 (1959).

12. See, e.g., W. LAFAVE & A. SCOTT, *HANDBOOK ON CRIMINAL LAW* 382 (1972). The Model Penal Code's necessity defense provides:

Section 3.02. Justification Generally: Choice of Evils.

(1) Conduct which the actor believes to be necessary to avoid a harm or evil to himself or another is justifiable, provided that:

(a) the harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged; and

(b) neither the Code nor other law defining the offense provides exceptions or defenses dealing with the specific situations involved; and

(c) a legislative purpose to exclude the justification does not otherwise plainly appear.

(2) when the actor was reckless or negligent in bringing about the situation requiring a choice of harms or evils or in appraising the necessity for his conduct, the justification afforded by this section is unavailable in a prosecution for any offense for which recklessness or negligence, as the case may be, suffices to establish culpability.

MODEL PENAL CODE § 3.02 (Proposed Official Draft 1962).

13. See T. PATRICK & T. DULACK, *supra* note 7, at 270.

14. Ted Patrick, for example, relies on both official reluctance to prosecute parents for abduction and false imprisonment and his belief that deprogrammers may assist parents in such activities:

From my research into the subject I was reasonably well assured that a parent would not be prosecuted for kidnapping his own child, especially if the child was a minor. With that in mind, I began to formulate the basis of my approach to seizing the children and deprogramming them. The first rule was always to have at least one of the parents present when we went to snatch somebody. The parents would have to make the first physical contact; then, no matter who assisted them afterwards, it would be the parents who were responsible. *And if a parent was not committing a crime by seizing his or her child, no one else could be considered an accessory to a crime.*

T. PATRICK & T. DULACK, *supra* note 7, at 65 (emphasis added).

15. Patrick has been acquitted twice in New York. Brown, *Memorandum on Ted Patrick and Religious Cults*, in *Deprogramming: Documenting the Issue*, *supra* note 8, at 138. Patrick was also acquitted in Washington. *United States v. Patrick*, 532 F.2d 142 (9th Cir. 1976). Patrick was convicted of false imprisonment in Colorado, in *People v. Patrick*, 541 P.2d 320 (Colo. App. 1975), and was convicted along with the cult member's parents, of misdemeanor kidnapping, in Orange County, California. See *Individual Freedom Foundation Newsletter*, reprinted in *Deprogramming: Documenting the Issue*, *supra* note 8, at 134. Most recently, Patrick was convicted in San Diego, California, of conspiracy, false imprisonment, and kidnapping. This was the first time that Patrick was convicted of a felony. See *People v. Patrick*, N.Y. Times, Aug. 30, 1980, at 7, col. 1 (San Diego Super. Ct. Aug. 29, 1980).

This Note considers the applicability of the necessity defense in criminal prosecutions of parents and deprogrammers. Part I explores the conflicting policies that underlie the traditional necessity defense, and suggests that courts replace their unitary approach to necessity with a "choice of evils" defense — for actors reasonably attempting to avoid a greater evil — and a "compulsion" defense — for actors reacting understandably to the pressure of circumstances. Part II applies these defenses to deprogramming cases, and concludes that rarely may they be advanced successfully.

I. A THEORETICAL FRAMEWORK FOR JUDGING NECESSITY CASES

A. *The Inadequacy of a Unitary Approach to Necessity*

The necessity defense, like any other doctrine of excuse or justification,¹⁶ should be sustained whenever its underlying policies are furthered.¹⁷ Identification of those policies is, therefore, a prerequi-

16. A defense can either justify or excuse behavior that would otherwise be criminal. Broadly speaking, a defense justifies behavior when it recognizes "an exception to a general rule making [certain behavior punishable] . . . because the policy or aims which in general justify the punishment" do not apply in a specific case. . . . [W]hat is done is regarded as something which the law does not condemn, or even welcomes." A defense excuses behavior when "[w]hat has been done is something which is deplored, but the psychological state of the agent when he did it exemplified one or more of a variety of conditions which are held to rule out the public condemnation and punishment of individuals." H. HART, *Prolegomenon to the Principles of Punishment*, in PUNISHMENT AND RESPONSIBILITY 1, 13-14 (1968). The distinction has been explained as "the same as that between being forgivably wrong and being right, or between being pardoned and being praised." Arnolds & Garland, *supra* note 11, at 290.

On the nature of excuse and justification generally, see H. HART, *Legal Responsibility and Excuses*, in THE CONCEPT OF LAW 174-75 (1961); Eser, *Justification and Excuse*, 24 AM. J. COMP. L. 621 (1976); Fletcher, *The Individualization of Excusing Conditions*, 47 S. CAL. L. REV. 1269 (1974); Hall, *Comment on Justification and Excuse*, 24 AM. J. COMP. L. 638 (1976); Robinson, *A Theory of Justification: Societal Harm as a Prerequisite for Criminal Liability*, 23 UCLA L. REV. 266. The confusion regarding the nature of the necessity defense (and perhaps confusion regarding the difference between excuse and justification) is evident in the split among courts and commentators on whether the necessity defense functions as an excuse or a justification. Most courts, however, view the defense as a justification. See, e.g., *United States v. Bailey*, 585 F.2d 1087, 1098 (D.C. Cir. 1978), *rev'd.*, 444 U.S. 394 (1980); *United States v. Micklus*, 581 F.2d 612, 615 (7th Cir. 1978); *State v. Marley*, 54 Hawaii 450, 471, 509 P.2d 1095, 1109 (1973). A minority of courts have viewed the defense as an excuse, which mitigates rather than eliminates criminal responsibility. See, e.g., *Frasher v. State*, 8 Md. App. 439, 448, 260 A.2d 656, 662, *cert. denied*, 400 U.S. 959 (1970). See also R. PERKINS, PERKINS ON CRIMINAL LAW 956 (2d ed. 1969). The better view is probably one which acknowledges that necessity can function as either a justification or an excuse, depending on the nature of the case. See Fletcher, *supra*, at 1274-77. Cf. *United States v. Randall*, 104 Daily Wash. L. Rep. 2249, 2251 (D.C. Super. Ct. 1976) ("Traditionally, the defense of necessity has been characterized as being either a justification of or an excuse for criminal activity.").

17. For a thorough survey of the various theories behind the recognition of "excusing conditions" in the criminal law, see H. HART, *supra* note 16, at 28-53. Hart argues:

[E]xcusing conditions are accepted as something that may conflict with the social utility of the law's threats Recognition of excusing conditions is seen as a matter of protection of the individual against the claims of society for the highest measure of protection that can be obtained from a system of threats. In this way the criminal law respects the claims of the individual as such, or at least as a *choosing being*, and distributes its coercive sanctions in a way that reflects this respect for the individual.

site to analysis of the traditional approach to the defense. Although defendants plead necessity infrequently,¹⁸ they have sought to apply the defense to remarkably diverse types of conduct.¹⁹ The variegated necessity cases, however, divide readily into three distinct fact

Id. at 49 (emphasis in original). See also Fletcher, *supra* note 16, at 1299-309 (arguing that American law, unlike German law, resists recognition of excuses or defenses that would require inquiry whether specific defendants in particular cases deserve punishment).

18. See J. HALL, *GENERAL PRINCIPLES OF CRIMINAL LAW* 416 (2d ed. 1960) ("The explanation of [the necessity doctrine] in English and American law, which has perforce dealt only piecemeal with peripheral aspects of the general problem, is disappointing."); W. LAFAVE & A. SCOTT, *supra* note 12, at 383 ("[T]he cases are not numerous . . ."); G. WILLIAMS, *CRIMINAL LAW* 731 (2d ed. 1961) ("There are few American authorities."). It has been suggested that the paucity of cases involving the defense can be attributed to the unwillingness of law enforcement officials to prosecute in cases involving a clear, compelling claim of necessity. See Arnolds & Garland, *supra* note 11, at 291.

19. The necessity defense has been raised in cases involving cannibalism, see *Regina v. Dudley & Stevens*, 14 Q.B.D. 273 (1884) (defendants were sentenced to death, but sentence was later commuted to six months imprisonment), and human jettison, see *United States v. Holmes*, 26 Cas. 360 (C.C.E.D. Pa. 1842) (No. 15,383) (defendant convicted of manslaughter, but his six month sentence was later remitted). It has also justified mutinies, see, e.g., *United States v. Borden*, 24 F. Cas. 1202 (D.C. Mass. 1857) (No. 14,625) (revolt was justified if the crew had good reason to believe, and did believe, that they would be subjected to unlawful and cruel or oppressive treatment); *United States v. Nye*, 27 F. Cas. 210 (C.C. Mass. 1855) (No. 15,906) (jury instructed that revolt was justified if there were reasonable grounds to believe the ship unseaworthy), entries to embargoed ports, see, e.g., *The Diana*, 74 U.S. (7 Wall.) 354 (1868) (necessity defense rejected absent demonstration of actual necessity); *Brig Struggle v. United States*, 13 U.S. (9 Cranch) 71 (1815) (necessity defense rejected absent evidence of actual necessity); *The William Gray*, 29 F. Cas. 1300 (C.C.D.N.Y. 1810) (No. 17,694) (defendants acquitted based on necessity defense), and killing animals to protect property, see, e.g., *Aldrich v. Wright*, 53 N.H. 398, 16 Am. Rep. 339 (1873); *Cross v. State*, 370 P.2d 371 (Wyo. 1962).

More recently, the defense has frequently been used in cases involving prison escapes. See, e.g., *United States v. Bailey*, 444 U.S. 394 (1980) (rejecting necessity and duress defenses); *Dempsey v. United States*, 283 F.2d 934 (5th Cir. 1960) (court rejected prisoner's "justification" defense because he had not requested aid from prison authorities); *State v. Horn*, 58 Hawaii 252, 566 P.2d 1378 (1978) (necessity defense was available if certain conditions existed, and the defense should have been submitted to the jury); *People v. Unger*, 66 Ill. 2d 333, 362 N.E.2d 319 (1977) (reversed conviction because defense of necessity should have been submitted to jury); *Iowa v. Reese*, 272 N.W.2d 863 (Iowa 1978) (rejected necessity defense because prisoner failed to return after escape); *People v. Brown*, 68 A.D.2d 503, 417 N.Y.S.2d 966 (1979) (justification defense rejected because prisoner did not return after escaping); *State v. Whisman*, 33 Or. App. 147, 575 P.2d 1005 (1978) (choice of evils defense rejected because there was no showing that the harm avoided was present, imminent, and impending). The appropriate method for analyzing escape cases has also received extensive discussion in law reviews. See, e.g., Fletcher, *Commentary, Should Intolerable Prison Conditions Generate a Justification or an Excuse For Escape*, 26 UCLA L. REV. 1355 (1979); Gardner, *The Defense of Necessity and the Right to Escape from Prison*, 49 S. CAL. L. REV. 110 (1975); Note, *Duress — Defense to Escape — Substantial threats of homosexual attack may support the defense of duress in a prosecution for prison escape*, *People v. Harmon*, 53 Mich. App. 482, 220 N.W.2d 212 (1974), 3 AM. J. CRIM. L. 331 (1975).

Social protestors have also made frequent use of the necessity defense. See, e.g., Note, *Necessity as a Defense to a Charge of Criminal Trespass in an Abortion Clinic*, 48 U. CIN. L. REV. 501 (1979). Persons claiming medical necessity have advanced the defense as well. See *United States v. Randall*, 104 Daily Wash. L. Rep. 2249 (D.C. Super. Ct. 1976) (necessity defense successfully asserted by defendant who claimed marijuana was necessary to treat his glaucoma); *United States v. Richardson*, 588 F.2d 1235, 1239 (9th Cir. 1978) (defense of necessity was unavailable to persons caught smuggling laetrile into the country because there were alternative means of obtaining the drug).

situations, which reveal that the defense may serve several independent and potentially conflicting policies.

Each of the paradigmatic fact situations requires that an actor choose between obeying or breaking a law under circumstances where some harm is inevitable regardless of the actor's decision.²⁰ In the first situation, an actor violates a law to avoid a greater harm than that caused by the violation. For example, the theft of a car to rush a dying relative to the hospital might be excusable because the legislature would condone conduct that burdens or destroys property to save life.²¹ In the second situation, an actor violates a law in a good faith, but ultimately unsuccessful, attempt to avert a greater harm. He might, for example, steal a car to rush a dying pet to a veterinarian — a normative mistake if the legislature would let the pet die²² — or misjudge the magnitude of the harm caused or avoided, and destroy \$3000 worth of property to save \$1000 worth — a factual mistake.²³ In the third situation, an actor violates a law to avoid a harm that he knows society considers less grave than the harm caused. A husband who sacrifices two strangers to save his wife typifies this category of actor.

In each of these situations, society may find compelling reasons for choosing not to punish the actor. Most commonly, the necessity defense is grounded in the utilitarian notion that society benefits if an actor, by violating a law, avoids a greater harm.²⁴ Punishment in

20. The harm is inevitable in the sense that some harm will ensue regardless of the actor's choice. In this Note, "harm avoided" refers to the harm that can be avoided or the interest that can be protected by breaking the law; "harm caused" denotes the harm that must be endured or the interest that must be jeopardized should the actor elect to disobey the law.

21. It is fairly well accepted that property may be appropriated or even destroyed in order to save life or prevent injury. *See* MODEL PENAL CODE § 3.02, Comment (Tent. Draft No. 8, 1958) (mountain climber may enter dwelling during storm and appropriate provisions therein; ship captain may jettison cargo to preserve ship and passengers).

The validity of the actor's value choice, and therefore the applicability of the defense, is always measured with reference to what the legislature would have done if faced with a similar situation. *See* G. FLETCHER, *RETHINKING CRIMINAL LAW* 790 (1978). This is recognized in the Model Penal Code. *See* MODEL PENAL CODE, *supra*, at § 3.02(1)(c).

22. A "normative mistake" is made when the actor believes that the type of harm avoided by breaking the law is more severe than the type of harm caused. In some cases, the proper choice is clear; for example, it is generally conceded that property may be appropriated or destroyed in order to preserve life or avert injury. *See* note 21 *supra*. In other cases, however, the proper choice is not as clear. To the extent that the necessity defense is premised on a utilitarian rationale, *see* text at notes 24-26 *infra*, the actor's choice will be subject to a post-hoc scrutiny that inquires whether the legislature would have made the same choice. In fact in such situations the necessity defense "makes the judge [an] ad-hoc . . . legislature." *See* M. KADISH & S. KADISH, *DISCRETION TO OBEY* 124 (1973).

23. The mistake is factual in the sense that the actor has misestimated the degree of harm either caused or avoided by breaking the law. This type of mistake differs from the normative mistake in that here the actor is correct in his evaluation of the normative "weight" to be assigned the two harms. The actor's mistake and his failure to secure the greater good result from the fact that his decision to break the law causes more harm or avoids less harm than the actor had anticipated.

24. *See, e.g.*, W. LAFAVE & A. SCOTT, *supra* note 12, § 50, at 382 ("The rationale of the

the first situation, for example, may discourage socially desirable conduct. Although a violation by an actor in the second category may make society worse off, society also has a utilitarian interest in encouraging action when it reasonably appears that intervention will prevent a greater evil.²⁵ Even if the actor's belief that society would favor intervention was unreasonable, it is unclear whether punishment will in fact result in fewer normative and factual errors.²⁶ Utilitarian principles, however, cannot affirmatively justify exculpating the third type of actor.

An actor's lack of criminal intent may also underlie acceptance of the necessity defense in certain circumstances.²⁷ Where an actor violates a law in a successful attempt to avert what the legislature would consider a greater harm, he is not culpable in any meaningful sense of the word.²⁸ Because a number of factors — including supe-

necessity defense is not that a person, when faced with the pressure of circumstances of nature, lacks the mental element which the crime in question requires. Rather, it is this reason of public policy: the law ought to promote the achievement of higher values at the expense of lesser values, and sometimes the greater good for society will be accomplished by violating the literal language of the criminal law."); Fletcher, *supra* note 16, at 1274 ("The rightness of the act typically turns on a comparison of the utility of acting (the value of the interest saved) with the disutility of acting (the value of the interest sacrificed). Rightness is thus a matter of maximizing utility, or furthering the greater good.").

25. There is no reason to suspect *a priori* that actors will more often than not make the wrong decision when confronting inevitable choices. At the same time, it has long been conceded that there are "such rare occurrences that it may be thought pedantic to legislate for them expressly beforehand, and rash to do so without materials which the course of events has not provided. Such cases are the case of necessity (two shipwrecked men on one plank) [and] the case of a choice of evils . . . Fiction apart, there is at present no law at all upon the subject, but the judges will make one under the fiction of declaring it, if the occasion for doing so should ever arise." Stephen, *The Criminal Code*, (1879), 7 THE NINETEENTH CENTURY, 136, 156 (1880) (footnote omitted).

A more comprehensive accounting of the cost involved in exculpating actors for their unsuccessful attempts to avoid the greater harm by breaking the law would probably take account of the possible decrease in respect for law and reduced certainty of the applicability in specific situations. See Powers, *Structural Aspects of the Impact of Law on Moral Duty Within Utilitarianism and Social Contract Theory*, 26 UCLA L. REV. 1263 (1979).

26. Because choice of evils situations arise infrequently, most individuals will not ponder the penalties of an incorrect choice in advance. And those individuals who do face these situations are likely to experience pressures that make consideration of punishment highly unlikely. See Greenawalt, *Conflicts of Law and Morality — Institutions of Amelioration*, 67 VA. L. REV. 177, 195 (1981):

It would certainly be a drawback if the existence of the defense encouraged actors to violate the law without sufficient assessment of whether their actions really were necessary to avoid greater evils. As far as private actors and ordinary circumstances are concerned, this possibility is implausible in the extreme, because such a rarely used defense is unlikely to have a significant effect on how private persons react to emergency situations.

27. See Hawkins, *supra* note 11, at 236, where it is suggested that in addition to its utilitarian purpose, necessity has been based on "the belief that he who acts to avoid an imminent harm has acted commendably (with good intentions). To punish him, therefore, would bring the law in general into disrepute." (footnote omitted).

28. The actor is not culpable because by breaking the law the greater good has been secured. See, W. LAFAYE & A. SCOTT, *supra* note 12, § 50, at 382; G. WILLIAMS, *supra* note 18, § 229, at 723 ("[W]hen a man has acted meritoriously, even a technical conviction is out of place. . . . Needless convictions are an abuse of the machinery of the criminal law and tend

rior information, greater intelligence, or mere luck — may determine whether an actor does or does not avoid the greater harm, the second type of actor is no more culpable than the first.²⁹ In the third situation, however, the actor cannot claim that he failed in an honest attempt to avoid what society would consider the greater harm. If good intentions are the sole determinant of culpability, actors in the third category are more culpable than those in the first two.

Yet the third type of actor's behavior may be "understandable" even though he did not intend to avoid what society considers the greater evil. As used here, "understandable" means that the behavior is to be expected — other individuals would make the same decision under similar circumstances.³⁰ Some courts have suggested that punishment is inappropriate in these situations because individuals

to adulterate its effect.") The actor should not be subject to penalty because "All laws admit certain cases of just excuse, when they are offended in letter, and where the offender is under necessity, either of compulsion or inconvenience." *More v. Hussey*, 80 Eng. Rep. 243, 246 (1609).

The question, of course, is under what circumstances are acts that would otherwise be criminal justified because they tend to secure the "greater good." But if it can be demonstrated that a particular act *does* further some higher value, it follows that punishment is inappropriate under any theory of punishment that focuses solely on the propriety of punishing the individual:

Many of the ordinary reasons for punishment simply do not apply when actors are morally justified in engaging in behavior that ordinarily is illegal. . . . [M]orally justified acts are not, on balance, harmful to the legitimate interests of the members of society, and society would not want to discourage those acts. Society has no reason to prevent such acts by means of incapacitation, general and individual deterrence, and norm reinforcement. If the act has been performed for morally justifiable reasons, moral delinquency could not be a basis for punishment, and commission of the act would not provide a ground for reform of character. Nor could the majority of society desire vengeance if it recognizes the appropriateness of the act.

Greenawalt, *supra* note 26, at 182.

29. In both situations the actor intends to violate the law and therefore "intends" to bring about some harm. But in both situations the actor intends to avoid the greater harm, and thereby secure the greater good, by violating the law. The difference, therefore, is in the outcome, and not in the actor's intent. If both actors intend to secure the greater good (or intend to avoid the greater harm), the actor in the second situation is no more culpable than the actor in the first. In this sense the actor in the second situation does not intend that his violation bring about the balance of harm (harm caused exceeding harm avoided) that results from either a normative or a factual mistake. Punishment therefore runs contrary to the notion that "our substantive criminal law is based upon a theory of punishing the vicious will. It postulates a free agent confronted with a choice between doing right and doing wrong and choosing freely to do wrong." F. SAYRE, *CASES ON CRIMINAL LAW* xxxvi-xxxvii (1927) (Introduction, Roscoe Pound). See also H. HART, *supra* note 16, at 114 ("All civilized penal systems make liability to punishment for at any rate serious crime dependent not merely on the fact that the person to be punished has done the outward act of a crime, but on his having done it in a certain state or frame of mind or will.").

30. One commentator, addressing this issue in the context of the duress defense, has perceptively noted that the question is not whether an actor *could* make the "correct" choice, but rather whether it is fair to expect that choice of the actor given the extreme pressure acting upon the actor owing to the nature of the interests at stake: "I am extremely reluctant to regard all or even most cases involving duress or coercion as cases where, given psychological pressures, the individual could not have acted otherwise. . . . Rather we do not even expect him to try. We rely instead on the belief that the choice is unfairly posed." Murphy, *Consent, Coercion, and Hard Choices*, 67 VA. L. REV. 79, 85-86 (1981) (emphasis added).

are "compelled by circumstances"³¹ and do not act with legal free will.³² This analysis is incorrect: The legal elements of a volitional act are present in these cases.³³ It is more accurate simply to concede the actor's error and ask whether society should punish the behavior.

The notion that society may wish to exculpate actors rather than hold them to standards that average individuals could not meet, while not affirmatively supported by utilitarian principles,³⁴ may not contravene those principles. Punishing actors in the third category may serve no practical purpose. Even the prospect of the death penalty will not necessarily deter an actor who seeks to avert death or serious injury to himself or someone close to him in an emergency situation.³⁵

Although courts cognizant of each of the policies underlying the

31. Cf. *United States v. Mowat*, 582 F.2d 1194, 1208 (9th Cir.), cert. denied, 439 U.S. 967 (1978) (in discussing necessity, the court suggested that the test was whether there was "sufficient compulsion"); *The William Gray*, 29 F. Cas. 1300, 1302 (C.C.D.N.Y. 1810) (No. 17,694) ("The variety of cases in which the absence of will excuses those who would otherwise be offenders, have been mentioned in the course of the argument, and among them we find that on which this defense proceeds, namely, an act which proceeds from compulsion and inevitable necessity.").

32. See, e.g., *People v. Keating*, 118 Cal. App. 3d 172, 173 Cal. Rep. 286, 289 n.1 (1981); *State v. Green*, 470 S.W.2d 565, 570 (Mo. 1971) (*en banc*) (Seiler, J., dissenting), cert. denied, 405 U.S. 1073 (1972) ("The affirmative defense of coercion and necessity are based upon the same principle. 'If a person commits an act under compulsion, responsibility for the act cannot be ascribed to him since in effect, it was not his own desire, or motivation, or will, which led to the act.'" (footnote omitted) (citing Newman & Weitzer, *Duress, Free Will and the Criminal Law*, 30 S. CAL. L. REV. 313, 313 (1957))).

33. A criminal walking to execution is under compulsion if any man can be said to be so, but his motions are just as much voluntary actions as if he was going to leave his place of confinement and regain his liberty. He walks to his death because he prefers it to being carried. This is choice, though it is a choice between extreme evils.

J. STEPHEN, A. HISTORY OF THE CRIMINAL LAW OF ENGLAND 102 (Burt Franklin: Research and Resource Series No. 71, 1964). See, e.g., *State v. Michne*, — Me. —, 427 A.2d 455 (1981).

34. Utilitarian principles do not justify exculpating such actors because the individual knows that society considers the harm avoided less grave than the harm caused. Society is worse off because the law is broken.

35. Hobbes recognized that even the most severe penalties would not serve to deter actors in such situations:

[N]o law can oblige a man to abandon his own preservation. And supposing such a law were obligatory; yet a man would reason thus, *If I do it not, I die presently; if I do it, I die afterwards; therefore by doing it, there is time of life gained*; nature therefore compels him to the fact.

T. HOBBS, *LEVIATHAN* 197 (New York 1947) (1st ed. London 1651) (emphasis added). Williams takes the same position:

Observe that the reason for withholding punishment is not that the threat of punishment has failed to operate in this particular case, for that is true of every crime [W]e generally cannot tell until after the event whether a threat of punishment will deter a particular person. . . . It is only in certain classes of cases that we can say with reasonable probability that the threat of punishment will not deter. When we can say this, utilitarian theory demands that the threat of punishment be not employed, for it can result only in useless suffering.

G. WILLIAMS, *supra* note 18, at 738. See also Wechsler & Michael, *A Rationale of the Law of Homicide* (pt. 1), 37 COLUM. L. REV. 701, 738-39 (1937).

necessity defense would justify or excuse³⁶ actors in all three situations, courts accept the defense in practice in only a narrow range of cases. Most courts rely on a single formulation of the necessity defense regardless of the facts of particular cases and the policies that are implicated.³⁷ To advance the defense successfully, a defendant must establish that (1) he perceived³⁸ the action necessary to prevent an imminent³⁹ harm;⁴⁰ (2) the harm avoided outweighed the harm that the law was designed to prevent;⁴¹ and (3) there existed no rea-

36. This distinction has one important effect. When conduct is justified, it establishes a new rule of law to govern the value conflict faced by the actor: The court has decided that in choosing between two possible courses of action, the actor has chosen the correct one. Consequently, any actor in similar circumstances in the future should make the same choice. Fletcher, *supra* note 16, at 1275-76. Consider, for example, a court that holds that parents are justified in having their child deprogrammed. The court is saying that society has benefitted and hence the conduct is justified, when the choice of evils is resolved in favor of deprogramming. This rule will govern such choices in the future. In contrast, because excuses focus on the particular actor's mental state, they do not establish a rule of law binding future actors. Eser, *supra* note 16, at 635. The fact that one actor was not blameworthy because his mental state was such that his conduct is excused, does not mean that a later actor, in the same circumstances, will be excused if he makes the same choice. Whether the actor is excused will be determined by focusing on his particular mental state.

It should be noted, however, that these differences are moderated to some extent by the fact that justifications and excuses are rarely used in their "pure" form. For example, with any justification there is going to be some consideration of the actor's mental state. If the actor intended to commit a harmful act, but the act turned out to be beneficial because of circumstances of which he was unaware, courts do not hold that the act is justified. See *Bavero v. State*, 347 So.2d 781, 784 (Fla. Dist. Ct. App. 1977) (prisoner escaping must prove that he did so to avoid imminent danger, rather than with intent to elude lawful authority); MODEL PENAL CODE § 3.02, Comment 5 (Tent. Draft No. 8, 1958); Gardner, *The Defense of Necessity and the Right to Escape From Prison — A Step Towards Incarceration Free from Sexual Assault*, 49 S. CAL. L. REV. 110, 119-20 (1975). The same rule has also developed in self-defense cases. See, e.g., *Josey v. United States*, 135 F.2d 809 (D.C. Cir. 1943). Moreover, in considering excuses, courts do not focus exclusively on the mental state of the actor. Decisions are in part based on certain assumptions about the way society can expect the actor to behave (this is most evident in the use of the reasonable man standard). Courts may focus more on circumstances, and assumed mental states, than on an individual actor's mental state.

37. Cf. *United States v. Bailey*, 585 F.2d 1087, 1098 (D.C. Cir. 1978), *revd.*, 444 U.S. 394 (1980) (noting the "tendency of courts to structure duress/necessity defenses in terms of . . . fixed rules").

38. The rule has been stated by LaFave and Scott as follows:

An honest (and, doubtless, reasonable) belief in the necessity of his action is all that is required, however, so that he has the defense even if, unknown to him, the situation did not in fact call for the drastic action taken. Thus if A kills B reasonably believing it to be necessary to save C and D, he is not guilty of murder even though, unknown to A, C and D could have been rescued without the necessity of killing B.

W. LAFAVE & A. SCOTT, *supra* note 12, § 50, at 386. See *Arnolds & Garland, supra* note 11, at 294; *Tiffany & Anderson, supra* note 11, at 868.

39. See, e.g., *United States v. Ashton*, 24 Cas. 873, 874 (No. 14,470) (C.C.D. Mass. 1834); *State v. Johnson*, 289 Minn. 196, 201, 183 N.W.2d 541, 544 (1971); *State v. Graham*, 201 Neb. 659, 662, 271 N.W.2d 456, 458 (1978); *State v. Burney*, 49 Or. App. 529, 619 P.2d 1336, 1339 (1980); W. LAFAVE & A. SCOTT, *supra* note 12, § 50, at 388.

40. W. LAFAVE & A. SCOTT, *supra* note 12, § 50, at 386; *Arnolds & Garland, supra* note 11, at 294.

41. This balancing is done objectively by the court, and not by the actor himself. See W. LAFAVE & A. SCOTT, *supra* note 12, § 50, at 259.

sonable alternatives to violating the law.⁴² Because courts have traditionally been wary of the defense,⁴³ many limit it in other ways as well.⁴⁴ Under this formulation, courts accept the defense in many cases where the defendant successfully averted a greater harm and in some cases where the defendant attempted to prevent a greater harm but failed. However, most courts, over occasional dissents and despite scholarly criticism,⁴⁵ reject the defense in the third fact situation.

The rationale for this unitary approach to the necessity defense is rarely expressed,⁴⁶ but it appears to be based on a compromise between notions of utilitarianism and nonculpability that is not wholly consistent with any of the policies underlying the defense. The com-

42. See, e.g., *United States v. Mowat*, 582 F.2d 1194, 1208 (9th Cir.), cert. denied, 439 U.S. 967 (1978); *State v. Marley*, 54 Hawaii 450, 472, 509 P.2d 1095, 1109 (1973); *People v. Dalton*, 7 Ill. App. 3d 442, 287 N.E.2d 548, 550-51 (1972).

43. The reluctance to recognize the defense probably stems from a fear that the "principle once admitted might be made the legal cloak for unbridled passion and atrocious crime." *Regina v. Dudley & Stephens*, 14 Q.B.D. 273, 288 (1884). The premise of the defense arguably runs counter to "the proposition that, however it may be that . . . persons come by their thoughts and motives, it is possible for them to control their conduct — at least as regards the infliction of serious harms." J. HALL, *supra* note 18, at 415.

44. For example, necessity is not a defense to killing an innocent person. See, e.g., *Regina v. Dudley & Stevens*, 14 Q.B.D. 273 (1884); R. PERKINS, *supra* note 16, at 957. There are no cases in this country in which necessity has been accepted as a defense to the killing of another person. *Hawkins*, *supra* note 11, at 239.

And the harm prevented must be caused by natural, not human, forces. See, *United States v. Micklus*, 581 F.2d 612, 615 (7th Cir. 1978); *State v. Olsen*, 99 Wis.2d 572, 299 N.W.2d 632, 634 (1980); W. LAFAVE & A. SCOTT, *supra* note 12, § 50, at 381. One writer has suggested that this restriction precludes the application of the necessity defense to deprogramming cases: "The 'deprogramming' situation is obviously of human origin, not created by the weather or a natural catastrophe, and, consequently, the 'necessity' defense is incorrectly invoked in such actions." Note, *supra* note 4, 11 SUFFOLK L. REV. at 1048.

In addition, the value choice made by the actor cannot be foreclosed by a deliberate legislative choice, MODEL PENAL CODE § 3.02, Comment 1(b) (Tent. Draft No. 8, 1958), or be based on moral opposition to the statute, see generally Note, *supra* note 19, 48 U. CIN. L. REV. at 508. Nor can the actor's predicament be a result of his own negligence. See *Sansom v. State*, 390 S.W.2d 279, 280 (Tex. Crim. App. 1965) (court rejected defendant's claim that he took control of car, while drunk, for purpose of parking it, because the defendant's predicament was "of his own doing"); 1 R. ANDERSON, WHARTON'S CRIMINAL LAW AND PROCEDURE § 171 (1957). But see *Woods v. State*, 121 S.W.2d 604, 605 (Tex. Crim. App. 1938) ("Nor do we believe that one, though negligently causing a collision, who receives injuries himself which would require treatment and medical attention, would be required to render aid to another . . .").

45. See *Fletcher*, *supra* note 19, at 1368 ("The fact is that we need a set of three defenses . . . [one of which would] cover the cases on nonculpable reactions to situations of danger."). Salmond argued some time ago that the necessity rubric covered any "motive adverse to the law, and of such exceeding strength as to overcome any fear that can be inspired by the threat of legal penalties Where threats are necessarily ineffective, they should not be made, and their fulfillment is the infliction of needless and uncompensated evil." J. SALMOND, JURISPRUDENCE 406 (7th ed. 1924). Nevertheless, Salmond concluded that the practical and evidentiary difficulties of implementing this theoretical position justified restricting the scope of the defense and limiting the effect of the defense to mitigation rather than excuse. *Id.* at 407.

46. This is not surprising given that most courts look at the defense as having a singular purpose (although their view of this purpose may vary). But see *United States v. Randall*, 104 Daily Wash. L. Rep. 2249 (D.C. Super. Ct. 1976) (recognizing two distinct views of necessity).

mon stipulation that the existence of evils is judged by the subjective perception of the actor⁴⁷ and many of the limits that courts have placed on the defense⁴⁸ undercut the utilitarian ideal. The refusal to exculpate actors who make normative mistakes⁴⁹ and other requirements that effectively preclude the defense despite the actor's desire to prevent a greater evil⁵⁰ undercut the nonculpability rationale. And the unitary approach completely ignores the idea that society may wish to exculpate actors who respond to unusually demanding circumstances precisely as most members of society would respond.

The inability of the unitary approach to encompass all of the diverse situations in which the policies underlying the necessity defense support withholding punishment justifies the recognition of two distinct defenses.⁵¹ The first, which this Note will refer to as the "choice of evils" defense, would exculpate actors whose conduct reasonably appeared necessary to prevent a greater evil. The second, which the Note will term the "compulsion" defense,⁵² would exculpate actors whose conduct resulted from unusually demanding circumstances that would cause a person of reasonable firmness to respond similarly.⁵³

B. *The "Choice of Evils" Defense*

Before accepting a choice of evils defense, courts should require defendants to demonstrate⁵⁴ an honest and reasonable belief that (1) their conduct was necessary to prevent a harm from occurring; (2) the harm likely to be avoided clearly outweighed the harm likely to be caused; and (3) there existed no reasonable alternative to violating the law. The availability of this reformulated defense would turn primarily on the reasonableness of the defendant's belief in necessity, but the defense is not without limits.

47. One court has been troubled by this inconsistency. In *United States v. Mowat*, 582 F.2d 1194 (9th Cir.), cert. denied, 439 U.S. 967 (1978), the court questioned the requirement that the facts be judged subjectively, suggesting that this approach was arguably inconsistent with the defense's purpose of insuring that the greater evil be avoided. 582 F.2d at 1208, n.14.

48. See note 44 *supra* and notes 62-78 *infra*.

49. See note 22 *supra* and notes 62-66 *infra*.

50. See note 44 *supra* and notes 67-82 *infra*.

51. A growing number of commentators are recognizing that courts should abandon the unitary approach to necessity. See Huxley, *supra* note 11, at 144; Comment, 67 CALIF. L. REV. 1183, 1200 (1979); Note, *Justification: The Impact of the Model Penal Code on Statutory Reform*, 75 COLUM. L. REV. 914, 921 (1975). The German Penal Code has recognized a dual notion of necessity. Section 35 StGB, quoted in Eser, *supra* note 16, at 636-37 n.81; § 34 StGB, quoted in Eser, *supra* note 16, at 634 n.65.

52. Although the Note uses the term "compulsion," the defense does not incorporate any belief that the defendant did not act of his own free will.

53. In many ways the proposed compulsion defense resembles a liberalized duress defense. See notes 98-115 *infra* and accompanying text.

54. The burden of proof in necessity cases has been placed on the defendant. See, e.g., *United States v. Randall*, 104 Daily Wash. L. Rep. 2249, 2254 (D.C. Super. Ct. 1976).

The requirement that defendants demonstrate a reasonable belief that the harm likely to be avoided outweighed the harm likely to be caused comports with the traditional fiction that an individual facing an inevitable choice acts as an agent of the legislature.⁵⁵ A purely subjective belief that the harm avoided outweighed the harm caused would not justify application of the choice of evils defense. For example, the defense would not avail an actor who destroyed draft records to avoid the harms associated with a war that he believed immoral. This limitation, which is common to both the unitary approach and this Note's proposal, is based on the belief that courts should confine the necessity defense to circumstances that, if considered, would have been exempted from the law.⁵⁶ If the legislature has explicitly decided the value choice that confronts an actor, he cannot claim that he violated the statute to avert a greater evil.⁵⁷

The proposed defense's further requirement that the harms to be avoided reasonably appear clearly to outweigh the harms caused comports with the notion that we live in a society of laws, and checks individual discretion to modify those laws. One could argue, as have the drafters of the Model Penal Code,⁵⁸ that actors should violate laws whenever it reasonably appears that the costs of obedience marginally outweigh the costs of violation. But such a standard would undermine citizens' respect for the law,⁵⁹ and courts should weigh

55. The tacit assumption, of course, is that the legislature would approve actions that bring about the "greater good," even if this requires violating the literal letter of the law. See M. KADISH & S. KADISH, *supra* note 22, at 124:

Instead of including the defense by specifying the particular circumstances in which the defense exists, the law may delegate authority to the courts to find a defense made out in terms of some broadly stated policy or principle. The legislature has gone as far as it can (or will) in defining the special circumstances of nonliability appropriate to the ends of its legislation. The task of defining others it remits to the courts on an ad hoc basis as the cases arise. It is in this sense that the lesser-evil defense may be said to be included in the law. The law includes the requirement that the courts assess whether breaching the rule was preferable to complying with it in the circumstances.

56. See, e.g., *State v. Goff*, 79 S.D. 138, 141-42, 109 N.W.2d 256, 257-58 (1961) (court inferred that legislature must have intended exception in statute).

57. Perhaps the foremost justification for this limitation is that it is preferable to have decisions made through democratic processes than by private individuals. It is only when the democratic system has failed to consider the precise issue that we should encourage private decision-making. And the risk of undermining respect for the law is particularly great where we allow individuals to override an explicit declaration of the legislature.

58. MODEL PENAL CODE § 3.02 (Proposed Official Draft, 1964). Thus, under the Model Penal Code, one is justified in taking one life if *more* than one life is thereby saved. For such purposes the Code commands that all lives are to be considered of equal worth. MODEL PENAL CODE § 3.02, Comment 3 (Tent. Draft No. 8, 1958).

59. The risks of encouraging citizens to violate the law when it is "justified" were discussed in *Nation v. District of Columbia*, 34 App. D.C. 453 (1910). In *Nation*, the court affirmed a conviction of Carry Nation for smashing bottles of liquor that she alleged were being sold unlawfully. The court held that even if the sale was a nuisance and was illegal, private persons should not take the matter into their own hands: "Mob law can have no recognition in our system and should be sternly repressed in its beginning." 34 App. D.C. at 455.

Similar concerns with citizens taking the law into their own hands have been expressed in civil disobedience cases. In *United States v. Moylan*, 417 F.2d 1002 (4th Cir. 1969), *cert. de-*

this diminution of respect in the utilitarian balancing of evils.⁶⁰ Exceptions to established laws are appropriate only where the "clearly outweighs" standard is satisfied.⁶¹ This pragmatic limitation on the proposed defense thus balances society's short-run interest in encouraging violations of the law when necessary to prevent a greater harm and society's long-run interest that actors not lightly violate its laws.

The "clearly outweighs" standard serves another function as well: Courts can use this limitation to replace the traditional approach to normative mistakes.⁶² Currently, an actor may qualify for the necessity defense notwithstanding a reasonable factual mistake,⁶³

nied, 397 U.S. 910 (1970), the court affirmed the defendants' convictions for destroying records of the selective service organization. The court rejected the defendants' claim that their moral beliefs justified such action: "No legal system could long survive if it gave every individual the option of disregarding with impunity any law which by his personal standard was judged morally untenable. Toleration of such conduct would not be democratic, as appellants claim, but inevitably anarchic." 417 F.2d at 1009. The court in *United States v. Cullen*, 454 F.2d 386 (7th Cir. 1971), rejected the same claim, arguing that "[a] simple rule, reiterated by a peace-loving scholar, amply refutes appellants' arrogant theory of defense: 'No man or group is above the law.'" 454 F.2d at 392 (quoting *United States v. United Mine Workers*, 330 U.S. 258, 385 (1947) (Rutledge, J., dissenting)). See *United States v. Dougherty*, 473 F.2d 1113 (D.C. Cir. 1972); *Chase v. United States*, 468 F.2d 131 (7th Cir. 1972); *United States v. Simpson*, 460 F.2d 515 (9th Cir. 1972); *United States v. Kroncke*, 459 F.2d 697 (8th Cir. 1972); *United States v. Berrigan*, 283 F. Supp. 336 (D. Md. 1968). The necessity defense is rejected in these cases, because the actor is substituting his moral judgment for a moral judgment that has already been made by the legislature (in this case, that the Vietnam war and the draft were justified). The necessity defense has traditionally been applied in situations where the court believes the choice of evils facing the actor was not considered by the legislature, and had it been, the legislature would have created an exception to the law. See Note, *supra* note 19, 48 U. CIN. L. REV. at 514 (legislature has already made value judgment on abortion).

60. Fletcher, *supra* note 16, at 1285-86, has discussed two distinct ways in which judges can balance the harms in necessity cases. First, they can balance the immediate costs and benefits that were apparent to the defendant at the time of his act. Second, they can consider the social consequences of acquitting the defendant for his act. For example, in prison cases this might include a consideration of the effect on prison discipline if the courts began to accept the necessity defense in these cases frequently. If the necessity defense is to be justified by utilitarian reasons, as in the case of justification necessity, courts should consider all the consequences of a decision to acquit. See *People v. Richards*, 269 Cal. App. 2d 768, 778, 75 Cal. Rptr. 597, 604 (1969).

61. G. GORDON, *THE CRIMINAL LAW OF SCOTLAND* 418 (2d ed. 1978), has stressed that the commission of a crime, in and of itself, has a negative value, and this should be considered in deciding the applicability of the necessity defense. He suggests that this requires that the harm avoided by the actor must be greater than the harm caused (to offset this negative value). However, he also points out that the view that "necessity should be limited to cases where the impending harm is out of all proportion to the harm done by the defendant may . . . set too high a standard . . ." *Id.* at 419 n.7 (quoting Law Commission Working Paper No. 55).

This has, in fact, been the approach most courts have taken. Arnolds & Garland, *supra* note 11, at 294, have noted that "[i]n most necessity cases, the question of which evil is the lesser is really not in dispute" (*i.e.*, it is not at issue unless the harm avoided was clearly greater). One court has specifically stated that necessity requires that the harm resulting from compliance with the law must have "significantly exceeded" the harm resulting from breach of the law. *State v. Marley*, 54 Hawaii 450, 472, 509 P.2d 1093, 1109 (1973).

62. See note 22 *supra*.

63. See W. LAFAVE & A. SCOTT, *supra* note 12, at 386; Arnolds & Garland, *supra* note 11, at 295; Tiffany & Anderson, *supra* note 11, at 868.

but most courts reject the defense if the actor made a normative mistake and balanced the competing harms incorrectly.⁶⁴ Actors thus run the risk that a court, sitting as “an ad hoc legislature,”⁶⁵ will decide against them despite an honest and reasonable attempt to avoid what society would consider the graver harm.⁶⁶ The proposed defense renders this limitation unnecessary. Because the defense requires a reasonable belief that the harm likely to be avoided clearly outweighs the harm likely to be caused, actors will obey the law in marginal cases characterized by substantial uncertainty.

The choice of evils defense would also permit the elimination of other limitations on the traditional approach. Although the proposed defense retains the requirement that there be no reasonable alternative to breaking the law,⁶⁷ the “imminence” requirement⁶⁸ would be largely eliminated. Many courts, interpreting imminence as a temporal requirement, have limited the necessity defense to cases where the harm was about to occur.⁶⁹ This approach is grounded primarily in the notion that unless the harm is temporally imminent an unforeseeable event may prevent its occurrence or a reasonable alternative to violating the law may become available.⁷⁰

64. Thus it has been said:

[A]lthough the defense of necessity is subjective as to facts, it is objective as to values. The selection of values cannot be left to the citizen. . . . [I]t is for the judge to decide whether, on the facts as they appeared to the defendant, a case of necessity in law was made out, and this in turn involves deciding whether, on a social view, the value assisted was greater than the value defeated.

G. WILLIAMS, *supra* note 18, § 239, at 746.

65. ALI, MINUTES OF THE COUNCIL 209 (1958), *cited in* M. KADISH & S. KADISH, *supra* note 22, at 124 n.85.

66. This concept of reasonableness must include an evaluation based on the weight that society would give to the competing interests, rather than the individual's personal preferences. Although an individual may consider the “value” of his wife's life to be many times greater than that of any other life, society does not benefit by encouraging action based on this value judgment (although society may tolerate and excuse such a choice). This does not mean that the reasonable man will always balance evils *correctly*; it only means that the reasonable man will value them from society's perspective. There may be value choices on which reasonable minds could differ (although society has a particular preference), or situations of imminence that prevent a reasonable person from correctly balancing evils. *See* G. WILLIAMS, *supra* note 18, § 73, at 209. In these circumstances, the actor's choice may be reasonable, albeit incorrect.

67. *See* text at notes 53-54 *supra*. From a utilitarian perspective the key issue is what is the most socially useful means available to avoid the injury. This allows courts to greatly favor legal means, as they would probably avoid the harmful consequences of the illegal action (*e.g.*, disrespect for the law). It would not, however, require courts to force defendants to choose any legal alternatives regardless of the likelihood that the alternative is a reasonable substitute for the chosen action.

68. *See* note 39 *supra*.

69. *See, e.g.,* *Smith v. Green*, 470 S.W.2d 565, 568 (Mo. 1971), *cert. denied*, 405 U.S. 1073 (1972); *State v. Graham*, 201 Neb. 659, 662, 271 N.W.2d 456, 458 (1978).

70. *See* W. LAFAYE & A. SCOTT, *supra* note 12, § 50(5). It has also been argued that the imminence requirement ensures that individuals will interpose their judgment against the legislature's “only in cases of inescapable emergency.” *Fletcher, supra* note 19, at 1366-67. And one writer has claimed that although imminence is not a theoretically essential limit on the

But a temporal imminence requirement is overly restrictive.⁷¹ Utilitarian principles justify prevention of a harm that appears reasonably likely to occur, regardless of its imminence. Courts should thus refuse to accord talismanic significance to a finding that the harm was not imminent; instead, they should regard imminence as one factor bearing on the reasonableness of an actor's perception that the harm likely to be avoided clearly outweighed the harm likely to be caused.⁷²

Restrictions on the source and nature of the harm avoided would also be lifted under this Note's approach. Some courts assume that natural harms are more truly unavoidable than harms threatened by human agents,⁷³ and allow the necessity defense only if the harm avoided arose from a natural source.⁷⁴ This distinction may be sound, but courts can more rationally incorporate it into the choice of evils defense by treating it as another factor relating to the reasonableness of the actor's perception of the need to violate the law.⁷⁵ Other jurisdictions restrict the defense to cases where an actor sought to prevent a particular type of harm (*i.e.*, serious bodily injury).⁷⁶ According to the drafters of the Model Penal Code, however, the principle that society benefits from avoidance of greater harm is one of general validity.⁷⁷ If the defendant reasonably believed that the harm to be avoided clearly outweighed the harm likely to be caused

defense, it can be tolerated as "simply an a priori balance of pertinent factors, a balance to which each citizen is bound." Robinson, *supra* note 16, at 280 n.53.

71. The unwarranted restrictiveness of the imminence requirement has been criticized by legal scholars. *See, e.g.*, Tiffany & Anderson, *supra* note 11, at 845-46; Note, *supra* note 51, at 926-27. There has been a "trend . . . to relax traditional notions of immediacy." Brief for Respondent at 44, *United States v. Bailey*, 444 U.S. 394 (1980).

72. Imminence is relevant to probability, insofar as harms about to occur are, generally, more likely to occur than those in the future. Imminence might also be defended as relevant because of the possibility that actors faced with an immediate harm are more likely to react emotionally (*i.e.*, because of the pressure of having to make a quick decision), than actors facing an equally serious and probable harm in the future.

73. *See* Gardner, *supra* note 19, at 132.

74. *See* note 44 *supra*.

75. The categorical application of the nature/human source distinction has been receiving increasing criticism. *See* *Iowa v. Reese*, 272 N.W.2d 863, 866 (Iowa 1978); Glazebrook, *supra* note 11, at 88-89. Tiffany & Anderson, *supra* note 11, at 857, indicate that codifications of necessity "virtually universal[ly]" reject this distinction.

76. *See* WIS. STAT. § 939.47 (1977) (limiting the necessity defense to situations involving the prevention of "public disaster, or imminent death, or great bodily harm").

77. There are no restrictions on the type of harm that can be imposed or the source of the harm that can be prevented. *See* MODEL PENAL CODE § 3.02 (Proposed Official Draft, 1962). Comment 3 to § 3.02 states:

We see no reason why the scope of the defense ought to be limited to cases where the evil sought to be avoided is death or bodily injury or any other specified harm; nor do we see a reason for excluding cases where the actor's conduct portends a particular evil, such as homicide.

MODEL PENAL CODE § 3.02, Comment 3 (Tent. Draft No. 8, 1958).

and has satisfied the other requirements of the defense, he should be acquitted, regardless of the type of harm avoided.

A third restriction on the type of harm avoided is also inconsistent with the policies underlying the proposed defense. Many courts have rejected the necessity defense where the situation that faced the actor resulted from his own negligence.⁷⁸ The rationale for these holdings is unclear.⁷⁹ Society may have an interest in punishing the original negligent conduct, but encouraging actors to take reasonable steps to prevent the greater evil once a dilemma has arisen furthers the utilitarian goal of the necessity defense. Where actors would be liable in tort for the greater harm caused by their negligence, this restriction may not deter socially desirable conduct.⁸⁰ But eliminating the requirement would benefit society where an actor's negligence is the "cause in fact" of a greater harm, but not the "proximate cause" necessary to establish tort liability.⁸¹ Therefore, if a previously negligent actor chooses properly between two evils, the severity of the punishment that he receives should not exceed that warranted for his initial negligence.⁸²

Courts adopting this Note's approach to necessity would also refuse to impose categorical restrictions on the types of harm that actors can cause to prevent a greater evil. Some courts, for example, hold that the necessity defense is never available in cases involving the taking of innocent lives.⁸³ Society may have an interest in countering the belief that killing is an appropriate solution to problems,⁸⁴ but most commentators reject this position.⁸⁵ From society's perspective, killing some people to save a greater number may be preferable when an actor confronts a situation in which some people must inevitably die.⁸⁶

78. See note 44 *supra*.

79. See Tiffany & Anderson, *supra* note 11, at 865.

80. Actors who would be liable for their negligence may well decide to risk criminal liability for causing the lesser harm necessary to avoid the consequences of their negligence.

81. For a comparison of various statutory formulations that differ in their treatment of the effect of an actor's prior fault and an evaluation of the desirability of such approaches, see Note, *Justification: The Impact of The Model Penal Code on Statutory Reform*, 75 COLUM. L. REV. 914, 928 (1975).

82. See Tiffany & Anderson, *supra* note 11, at 865-66; MODEL PENAL CODE § 3.02, Comment 1c (Tent. Draft No. 8, 1958).

83. See note 44 *supra*. This categorical restriction proceeds from the Kantian proposition that human life can never properly be used merely as a means to an end. See I. KANT, *Metaphysical Foundation of Morals*, in THE PHILOSOPHY OF KANT 178 (C. Friedrich ed. 1949) ("Act so as to treat man, in your own person as well as in that of anyone else, always as an end, never merely as a means."). Blackstone believed that a man "ought rather to die himself, than escape by the murder of an innocent." 4 W. BLACKSTONE, COMMENTARIES 29 (1854) (1st ed. Oxford 1765).

84. See, e.g., R. PERKINS, *supra* note 16, at 960.

85. Tiffany & Anderson, *supra* note 11, at 860.

86. This conclusion follows readily from utilitarian principles, given the assumption that

Where an actor violates a law in either a successful or an unsuccessful attempt to avoid a greater harm than that caused by the violation, the proposed choice of evils defense produces more desirable results than the unitary approach. By considering primarily the reasonableness of the defendant's belief in necessity, the revised defense better advances the utilitarian and nonculpability policies that underlie the necessity defense in such situations. And the proposal's "clearly outweighs" standard should also mollify courts that consider a choice of evils defense limitless. At the same time, this pragmatic limitation and the other restrictions built into the suggested defense render unnecessary the unsound categorical limits that courts have imposed under the traditional formulation of the necessity defense.

C. The "Compulsion" Defense

To qualify for the proposed compulsion defense, a defendant must establish that (1) he harbored an honest and reasonable belief that there existed a risk of death or serious injury to himself or to someone close to him; and (2) under the circumstances, individuals of ordinary firmness and respect for the law would have violated the law to avoid the threatened injury.⁸⁷ The compulsion defense attempts to address in a principled manner those cases in which an actor violates a law to avoid a harm that he knows society considers less grave than the harm caused. The defense thus responds to an apparent paradox: In some situations most, if not all, members of

all lives are of equal value. The Model Penal Code prescribes that all lives should be considered equally valuable. *See* MODEL PENAL CODE § 3.02, Comment 3 (Tent. Draft No. 8, 1958).

87. The defense should be denied to an actor who intentionally or recklessly placed himself in a situation in which it was reasonably foreseeable "that he would be subjected to a degree of coercion equal to or greater than that actually exerted, and that he would be required to commit an offense at least as serious as the one actually committed." Note, *The Proposed Penal Law of New York*, 64 COLUM. L. REV. 1469, 1507 (1964).

This stipulation is primarily designed to prevent leaders of criminal organizations from immunizing their underlings via threats. This concern was expressed in *United States v. Vigol*, 28 F. Cas. 376 (C.C.D. Pa. 1795), where the court warned that "it would be in the power of every crafty leader of tumults and rebellion, to indemnify his followers by uttering previous menaces." 28 F. Cas. at 376-77. To check this possibility, New York's Penal Code provides that the "defense of duress as defined in . . . this section is not available when a person intentionally or recklessly places himself in a situation in which it is probable that he will be subjected to duress." N.Y. PENAL LAW § 40.00 (2) (McKinney 1975).

This approach has been criticized because it precludes the defense for an actor who might have anticipated some small degree of coercion, but could not have anticipated the greater degree of coercion actually exerted. Note, *supra*, at 1507. To require, however, that the actor must anticipate that this greater degree of coercion would *probably* be exerted goes too far. For example, there are few, if any, situations in which an actor would anticipate that he would probably be threatened with death; even in the Mafia such a perception is questionable. Hence, confining the limitation to cases of probable duress would defeat the policy that justifies imposition of this limitation. The approach suggested here is a compromise position, reflecting the legitimate concern expressed in the Columbia Note, but at the same time providing a more meaningful limitation on the defense.

society will break laws that they generally support to avert a lesser evil.⁸⁸

The principle underlying the proposed defense — that society should not punish actors who behave as other persons would behave under the pressure of similar circumstances⁸⁹ — is neither unlimited nor novel. One could argue that all human behavior is compelled by circumstances — either genetic or environmental — over which the individual has no control.⁹⁰ Our legal system rejects this argument, and instead presumes that individuals can withstand the pressure of circumstances and conform their behavior to the law's requirements.⁹¹ Where this capacity is utterly lacking, punishment is not imposed. Thus, insane individuals are exculpated, and the defense of involuntariness exculpates actors who serve as the unwilling or unwitting agents of others.⁹²

But the line that the legal system draws between these actors and individuals who retain the ability to choose between obeying and breaking the law is not unwavering. The law also recognizes that external pressures may reduce an actor's criminal responsibility even though he did not wholly lack capacity and was capable of obeying the law. For example, provocation may reduce what would otherwise be murder to manslaughter.⁹³ This defense does not completely exculpate defendants because the law assumes that, although the provocation would affect reasonable individuals and reduce their criminal responsibility, it would not affect them to such a degree that killing is an excusable response.⁹⁴ The duress defense also recog-

88. See G. WILLIAMS, TEXTBOOK OF CRIMINAL LAW 579 (1978) ("Surely the jury are not to be asked whether it was *moral* for the defendant to give way to the threat. . . . He is acquitted not because he has chosen a lesser evil but because it is unlikely that the law's threats can serve a useful purpose in the circumstances.") (emphasis in original).

89. See note 30 *supra*.

90. See, e.g., B. SKINNER, SCIENCE AND HUMAN BEHAVIOR 6-7, 115-16 (1953); Bleechmore, *The Denial of Responsibility as a General Defense*, 23 ALA. L. REV. 237 (1971).

91. See, e.g., *United States v. Bailey*, 585 F.2d 1087, 1118 (D.C. Cir. 1978) (Wilkey, J., dissenting) ("It is a basic precept in Anglo-American law that the exercise of 'free' will is essential to criminal responsibility."), *rev'd.*, 444 U.S. 394 (1980); *D.P.P. v. Lynch*, (1975) A.C. 653, 689 (Lord Simon) ("[T]he law also accepts generally as an axiom the concept of the free human will — that is, a potentiality in the conscious mind to direct conscious action — specifically, the power of choice in regard to action."). Moreover, the law "assumes that free will exists equally in all persons and to an extent sufficient to conform to the normative prescriptions established by society." M. BASSIOUNI, SUBSTANTIVE CRIMINAL LAW 158 (1978).

92. For illustrations of cases in which convictions were reversed because the defendant did not act voluntarily, see Brinig, *The Mistake of Fact Defense and the Reasonableness Requirement*, GEO. MASON U. L. REV. 209, 211 n.5 (1978).

93. See, e.g., W. LAFAVE & A. SCOTT, *supra* note 12, § 76, at 573.

94. Arguably duress only reduces, but does not eliminate, the responsibility of the actor. If this view were accepted, duress, like provocation, might be treated as a ground for mitigation, but not exculpation of the crime. New Jersey has taken a middle approach, providing that duress mitigates murder to manslaughter, but exculpates all other crimes. *State v. Toscano*, 74 N.J. 421, 440 n.12, 378 A.2d 755, 764 n.12 (1977). This approach could be justified by the assumption that while the actor's capacity is sufficiently diminished to deny responsibility for

nizes the effects of external pressures,⁹⁵ and that, in some situations, human threats may so overwhelm an actor's ability to resist that he should be exculpated for his subsequent conduct.⁹⁶ Courts allow the duress defense not because actors facing illegal threats lack free will, but rather because the pressure on actors to make an "unreasonable" choice is so great that their violations are "understandable."⁹⁷

The proposed compulsion defense shares much in common with the traditional formulation of the duress defense. The duress defense exculpates defendants who violate the law in a manner demanded⁹⁸ by another individual,⁹⁹ in response to a specific

most acts, it is not so diminished that the actor does not have the capacity to appreciate the wrongfulness of killing a human being.

95. See *People v. Terry*, 30 Ill. App. 3d 713, 715, 332 N.E.2d 765, 767 (1975); *People v. Rodriguez*, 30 Ill. App. 3d 118, 120 (1975).

96. Many scholars have taken the view that the basis for the defense is that the individual's will was overcome. See, e.g., *Fletcher*, *supra* note 16, at 1288; and *Newman & Weitzer*, *supra* note 32, at 123-24. Newman and Weitzer suggest:

If a person commits an act under compulsion, responsibility for the act cannot be ascribed to him since, in effect, it was not his own desire or motivation, or will, which led to the act. Punishment of the actor would be misdirected and futile since it would deter neither him nor others, if all were equally compelled to do acts outside of their own control. Thus, the law has reasoned that where it can be shown that a man acted under a compulsion which deprived him of his free will, he should not be held responsible for his act. This, in essence, is the thinking that lies behind the formulation of the duress doctrine.

Id. at 123-24. Similar terminology has been used by many courts. See, e.g., *United States v. Bailey*, 585 F.2d 1087, 1096 (D.C. Cir. 1978), *rev'd*, 444 U.S. 394 (1980) ("negates the intent or voluntariness elements of an offense"); *Castle v. United States*, 347 F.2d 492, 494 (D.C. Cir. 1964), *cert. denied*, 388 U.S. 915 (1967) ("an act committed under compulsion . . . is involuntary"); *People v. Graham*, 57 Cal. App. 3d 238, 240, 129 Cal. Rptr. 31, 32 (1976) ("had only to raise a reasonable doubt he had acted in the exercise of his free will"); *People v. Wester*, 237 Cal. App. 2d 232, 234, 46 Cal. Rptr. 699, 703 (1965) ("escaping against his will"); *People v. Luther*, 394 Mich. 619, 622, 232 N.W.2d 184, 187 (1975) ("duress overcomes the defendant's free will"); *State v. Savoie*, 67 N.J. 439, 455, 341 A.2d 598, 607 (1975) (duress as incapacity to act voluntarily); *State v. Gann*, 244 N.W.2d 746, 752 (N.D. Sup. Ct. 1976) ("remove the free will of the actor"); *State v. Pearson*, 15 Utah 2d 353, 354, 393 P.2d 390, 391 (1964) (rejecting duress because the "escape was the result of a voluntary decision").

This position has also been taken by the English and Irish courts. *E.g.*, *Regina v. Kray* (Ronald), 53 Crim. App. 569, 578 (1969) ("ceased to be an independent actor"); *Regina v. Hudson* [1971] 2 Q.B. 202 ("will of the accused was overborne"); *Attorney-General v. Whelan*, [1934] I.R. 518, 526 ("overbear the ordinary power of human resistance").

97. Regardless of the pressures on an actor, the actor is still capable of choosing to comply with the law. G. GORDON, *supra* note 61, at 417. If society withholds punishment, it is not because the actor was unable to choose to act within the law; rather, it is because society recognizes the pressures on the individual and considers the imposition of punishment on an individual responding to these pressures to be unjust. In actuality, this is similar to the view that the actor lacked *free* will, because it is a recognition that the actor only violated the law because of the presence of external pressures. The proper inquiry for courts is into the sufficiency of these pressures and the understandability of the actor's response, rather than the actor's capacity for compliance with the law. See generally *Newman & Weitzer*, *supra* note 32, at 137 (suggesting that the "law must give up its present formulation of the duress doctrine. It must put aside the issues of free will altogether, profiting from its experiences with the concept and from the failure of this concept to serve desired purposes").

98. The existence of a coercer is a necessary implication of the requirement that the conduct be demanded.

99. See *United States v. Michelson*, 559 F.2d 567 (9th Cir. 1977); *Rhode Island Rec.*

threat¹⁰⁰ of imminent¹⁰¹ bodily injury¹⁰² to the defendant or a close relative.¹⁰³ The threat must be one that a person of ordinary firm-

Center, Inc. v. Aetna Cas. & Sur. Co., 177 F.2d 603, 605 (1st Cir. 1949); State v. Horn, 58 Hawaii 252, 566 P.2d 1378 (1977); People v. Robinson, 41 Ill. App. 3d 526, 529, 354 N.E.2d 117, 120 (1976); People v. Coogler, 35 Ill. App. 3d 176, 178, 340 N.E.2d 623, 624 (1975); State v. Jones, 2 Kan. App. 2d 220, 224, 577 P.2d 357, 360 (1978); State v. Dissini, 126 N.J. Super. 565, 569, 316 A.2d 12, 15 (App. Div. 1974), *aff'd*, 66 N.J. 411, 331 A.2d 618 (1975) (*per curiam*); State v. Procter, 51 Ohio App. 2d 151, 158-59, 367 N.E.2d 908, 913-14 (1977). However, the Rhode Island Rec. Center court noted:

[P]erhaps the law of coercion developed in a tough-minded age, and now-a-days its severity should be relaxed. Although we are not aware of any supporting authority, maybe we ought to hold that under the circumstances it could be found that the vague menace of future injury of some unspecified sort was enough to induce in Edward a well founded present fear of future death or serious physical harm.
177 F.2d at 605.

100. See United States v. Housand, 550 F.2d 818, 825 (2d Cir.), *cert. denied*, 431 U.S. 970 (1977); Shannon v. United States, 76 F.2d 490, 493 (10th Cir. 1935); People v. Lo Cicero, 71 Cal. 2d 1186, 1190, 80 Cal. Rptr. 913, 916, 459 P.2d 241, 244 (1969); People v. Robinson, 41 Ill. App. 3d 526, 527, 354 N.E.2d 117, 120 (1976); People v. Moon, 38 Ill. App. 3d 854, 350 N.E.2d 179, 186-87 (1976); State v. Milum, 213 Kan. 581, 582, 516 P.2d 984, 985 (1973); State v. Perry, 565 S.W.2d 841, 843-44 (Mo. Ct. App. 1978); State v. Brown, 561 S.W.2d 388, 390 (Mo. Ct. App. 1978); State v. Palmieri, 93 N.J.L. 195, 200, 107 A. 408, 409 (Ct. Err. & App. 1919); Esquibel v. State, 91 N.M. 498, 500, 576 P.2d 1129, 1131 (1978); Burton v. State, 51 Tex. Crim. 196, 201, 101 S.W. 226, 229 (1907). *Contra*, People v. Harmon, 53 Mich. App. 482, 486, 220 N.W.2d 212, 214 (1974), *aff'd*, 394 Mich. 625, 232 N.W.2d 187 (1975) (suggesting that in determining imminence, court should consider "all the surrounding circumstances, including the defendant's opportunity and ability to avoid the feared harm").

101. See Johnson v. State, 379 A.2d 1129 (Del. 1977); Bavero v. State, 347 So. 2d 781 (Fla. App. 1977); Hill v. State, 135 Ga. App. 766, 219 S.E.2d 18 (1975); People v. Unger, 66 Ill. 2d 333, 362 N.E.2d 310 (1977); People v. Hocquard, 64 Mich. App. 331, 236 N.W.2d 72 (1975); Esquibel v. State, 91 N.M. 498, 576 P.2d 1129 (1978); State v. Crews, 17 N.C. App. 141, 193 S.E.2d 317, 318 (1972); State v. Procter, 51 Ohio App. 2d 141, 378 N.E.2d 908 (1977).

102. It is not at all clear what parties, if any, can be threatened other than the actor. It has been suggested that "the determination . . . depends upon such factors as the relationship between accused and the person threatened or injured, the communication of such threats or injury to accused, etc. The few cases in point exhibit varying results in view of the individual facts and circumstances shown." Annot., 40 A.L.R.2d at 917 (1955). Commentators think that the defense is not limited to threats directed at the defendants. See Hersey & Avins, *Compulsion as a Defense to Criminal Prosecutions*, 11 OKLA. L. REV. 283, 286 (1958).

Although the cases on point are sparse, this view is supported by the case law. See, e.g., United States v. Garner, 529 F.2d 962 (6th Cir.), *cert. denied*, 429 U.S. 850 (1976) (duress defense applied even though threat was to defendant's daughter); United States v. Gordon, 526 F.2d 406, 408 n.1 (9th Cir. 1975) (dictum) (threats to family "would probably suffice" but threats to persons not related to the defendant would suffice only in "strong, dramatic and convincing" cases); United States v. Stevison, 471 F.2d 143 (7th Cir.), *cert. denied*, 411 U.S. 950 (1973) (coercion defense rejected, but not on ground that threat was to daughter); Rhode Island Rec. Center, Inc. v. Aetna Cas. & Sur. Co., 177 F.2d 603, 606-07 (1st Cir. 1949) (Magruder, J., concurring) (suggesting that coercion might be used in circumstances where there was threat to another, particularly to a close relative); State v. Toscano, 74 N.J. 421, 437, 378 A.2d 755, 763 (1977) (dictum) (suggesting that threats to "another person, such as a spouse or child, whose safety means more to the threatened person than his own well being" might be sufficient). In several cases, courts have explicitly rejected such claims, but these decisions were based on the specific language of an applicable state statute. See People v. Jones, 105 Cal. App. 3d 1, 164 Cal. Rptr. 124, 134-35 (1980).

103. See, e.g., Nall v. Commonwealth, 208 Ky. 700, 271 S.W. 1059 (1925); Commonwealth v. Reffitt, 149 Ky. 300, 148 S.W. 48 (1912); State v. Toscano, 74 N.J. 421, 378 A.2d 755 (1977).

ness would be unable to resist,¹⁰⁴ and cannot arise from the defendant's own negligence.¹⁰⁵ If the defendant ignored a reasonable opportunity to avoid the illegal conduct without undue risk of death or injury, the duress defense is unavailable.¹⁰⁶ The duress defense is also inapplicable in murder prosecutions,¹⁰⁷ and may be available only if the crime committed is a lesser evil than the threatened harm.¹⁰⁸ These similarities are not surprising: Many commentators view duress as a subset of necessity,¹⁰⁹ and courts often confound the two defenses.¹¹⁰

The narrowness of the duress defense, however, prevents defendants from relying on it in many situations where the theories underlying the necessity defense suggest that punishment may be inappropriate. Because duress is limited to cases involving human threats, it does not avail actors who were "compelled by the circumstances."¹¹¹ The compulsion defense proposed here recognizes that

104. See *People v. Rodriguez*, 30 Ill. App. 3d 118, 332 N.E.2d 194 (1975); *State v. Patterson*, 117 Or. 153, 241 P. 977 (1925).

105. See *United States v. Boomer*, 571 F.2d 543 (10th Cir.), cert. denied, 436 U.S. 911 (1978); *United States v. Gordon*, 526 F.2d 406 (9th Cir. 1975); *Shannon v. United States*, 76 F.2d 490 (10th Cir. 1935); *Rhode Island Rec. Center, Inc. v. Aetna Cas. & Sur. Co.*, 177 F.2d 603 (1st Cir. 1949); *People v. Tallent*, 89 Cal. App. 2d 158, 200 P.2d 214 (1948); *People v. Villegal*, 29 Cal. App. 2d 658, 85 P.2d 480 (1938).

106. See *Hersey & Avins*, *supra* note 102, at 284.

107. See, e.g., *R. PERKINS*, *supra* note 16, at 95.

108. This approach to analyzing duress situations was advocated by *Hersey & Avins*, *supra* note 102, at 291. Judge Wilkey, in his dissent in *United States v. Bailey*, 585 F.2d 1087 (D.C. Cir. 1978), took this attitude toward duress, explaining:

[T]he rationale for the defense is not that the defendant, faced with the unnerving threat of harm unless he does an act which violates the literal language of the criminal law, somehow loses his mental capacity to commit the crime in question. Rather, it is that, although a defendant has the mental state which the crime requires, his conduct which violates the literal language of the criminal law is excused or justified because he has thereby avoided a harm of greater magnitude.

585 F.2d at 1111 (emphasis in original).

109. See *W. LAFAYE & A. SCOTT*, *supra* note 12, § 50, at 383:

The defense of necessity is, of course, clearly related to that of duress (or coercion), where the pressure on the defendant's will comes from human beings rather than from physical circumstances. It is generally regarded as a separate defense, but it would doubtless be possible to treat it as a branch of the law of necessity.

See also *Fletcher*, *supra* note 16, at 1288-89.

110. See *United States v. Bailey*, 585 F.2d 1087, 1111 (D.C. Cir. 1978) (Wilkey, J., dissenting) ("Whether or not [the necessity and duress defenses] are actually distinct, they have been hopelessly commingled in case law.") (footnote omitted), *revd.*, 444 U.S. 394 (1980); *Commonwealth v. Thurber*, — Mass. —, 418 N.E.2d 1253, 1256 (1981).

111. Actors confronting circumstances arising from nature have to rely on the necessity defense. However, because necessity is limited to situations where actors make a reasonable choice, it is not a satisfactory defense for actors who concede the unreasonableness of their choice, but assert that the choice was understandable given the external pressures. The absence of an adequate defense for such actors is unjustified. Just as the law recognizes in duress cases that external pressures from human sources can excuse unreasonable decisions, it should recognize the effects of these pressures when their origin is in nature. There is no *a priori* reason to believe that human threats are more compelling; to the contrary, if the rationale for limiting necessity to cases of natural origin is to be believed — *i.e.*, human dangers are more

it is the nature of the interest threatened, and not the source or specificity¹¹² of the threat, that generates the pressures that cause actors to violate the law. There is no reason to believe that illegal threats are more compelling than threats to the same interests that arise from other circumstances that the actor is powerless to change.¹¹³ The proposed defense also recognizes that the desire to avoid a nonimminent harm may be as compelling as the desire to avoid an imminent harm.¹¹⁴ Under the new compulsion formulation, therefore, the fact-finder would consider the source of the threatened harm, its imminence, and the degree of certainty that the harm would occur as factors bearing on whether the defendant behaved as would an individual of ordinary firmness, rather than as categorical restrictions on the availability of the defense.¹¹⁵

Much of the restrictive attitude toward duress can be attributed to confusion regarding the purpose of the defense¹¹⁶ and to the proclivities of a "tougher-minded age,"¹¹⁷ but there are valid reasons to limit a defense based on the pressure of circumstances. To prevent the defense from exculpating all criminal behavior,¹¹⁸ courts must impose some constraints on the types of circumstances that pro-

likely to be averted — exactly the opposite conclusion is warranted. The duress defense proposed by the drafters of the Model Penal Code rejects many of the traditional limits on the duress defense, but retains the requirement that the defendant must have responded to an illegal threat made by another. *See* MODEL PENAL CODE § 2.09 (1) (Proposed Official Draft 1962).

112. *See* Note, *Prison Escape and Defenses Based on Conditions: A Theory of Social Preference*, 67 CALIF. L. REV. 1183, 1187 (1979) ("The requirement that the threat prompting the defendant's escape be 'a specific threat of death, forcible attack, or substantial bodily injury' will often have no bearing on the defendant's danger.") (quoting *People v. Lovercamp*, 43 Cal. App. 3d 823, 831, 118 Cal. Rptr. 110, 114-15 (1974)) (emphasis deleted).

113. *See, e.g.*, G. FLETCHER, *supra* note 21, at 834:

The slight reorientation required to expand the concept of duress is to shift one's focus away from the "threat" and the "coercion" and toward the act that is impelled under the circumstances. The question should not be whether the actor can be fairly expected to resist human threats, but whether he can fairly expect to abstain from an act that seems required under the circumstances.

114. *See* text at notes 67-72 *supra*.

115. Some courts have allowed juries considerable discretion in determining the applicability of the duress defense. *See, e.g.*, *People v. Harmon*, 53 Mich. App. 482, 486, 220 N.W.2d 212, 214 (1974), *aff'd*, 394 Mich. 625, 232 N.W.2d 187 (1975) (indicating that except in "the clearest cases" questions of imminence are to be decided by the jury taking into consideration "all the surrounding circumstances."); *State v. Toscano*, 74 N.J. 421, 442, 378 A.2d 755, 765 (1977) ("In charging the jury . . . the trial judge should advert to this factor of immediacy, as well as the gravity of the harm threatened, the seriousness of the crime committed, the identity of the person endangered, the possibilities for escape or resistance and the opportunities for seeking official assistance. He should also emphasize that the applicable standard for judging the defendant's excuse is the 'person of reasonable firmness in [the defendant's] situation.'").

116. *See* *State v. Toscano*, 74 N.J. 421, 436, 378 A.2d 755, 762 (1977).

117. *Rhode Island Rec. Center, Inc. v. Aetna Cas. & Sur. Co.*, 177 F.2d 603, 605 (1st Cir. 1949).

118. Concern over the possible effects of removing the rigid restrictions that have been imposed on exceptions to the free will assumption was expressed in *United States v. Bailey*, 585 F.2d 1087, 1120-21 (D.C. Cir. 1978) (Wilkey, J., dissenting), *rev'd*, 444 U.S. 394 (1980).

vide a legally recognized excuse. And society's interest in deterring illegal conduct may also justify limiting the scope of the defense. Although the ability of criminal sanctions to deter "compelled" conduct has been questioned,¹¹⁹ in most cases there is at least a possibility that sanctions will have some deterrent value.¹²⁰ Over time, punishment might indirectly deter socially undesirable conduct by raising the standard of reasonable behavior in the face of dire circumstances.

These considerations, however, do not justify limitations, such as the human threat requirement, that are unrelated either to the quantum of pressure on the actor or to the degree of resistance that society requires of him. Society's purposes can be served by requiring that the actor be faced with circumstances threatening death or serious injury to himself or someone close to him. It is in these situations that actors are most likely to fail to make the socially desirable choice, and least likely to be deterred by the threat of criminal sanctions.¹²¹ When lesser interests are threatened, or when the individual threatened is not close to the actor, unreasonable behavior is less likely to occur and punishment is more likely to deter. The proposed defense's limitation, therefore, corresponds more closely with both the typical individual's response to inevitable choice situations and society's need for restrictions on the defense than does the traditional human source requirement.

Since courts applying the proposed defense would look not to the source of the threat, but to the amount of pressure that would cause an individual of ordinary firmness and respect for the law to violate the law,¹²² it might be objected that the defense is standardless.¹²³

119. See note 35 *supra*.

120. The ability of the law to deter illegal conduct by people acting under duress is a long debated, but still unsettled, question. Stephen argued that "it is at the moment when temptation is strongest that the law should speak most clearly and emphatically to the contrary." 2 J. STEPHEN, *supra* note 33, at 107. Others have responded that the law can never effectively offset a threat of imminent injury to an actor. If the actor is willing to incur the injury rather than violate the law, it will stem from "other motives than the fear of legal punishment." *Arp v. State*, 97 Ala. 5, 12, 12 So. 301, 303 (1893). These positions are not wholly inconsistent. In extreme cases (for example, a threat of immediate death), the law almost certainly has no deterrent value. However, there are many pressures on individuals (even pressures great enough to compel an ordinary person to violate the law) that can probably be effectively countered on some occasions by a sufficiently severe sanction. The difficult question is whether the severity of the sanction required to offset the threat is so harsh that society would consider imposition of the sanction to be unjust.

121. See note 35 *supra*.

122. See *D.P.P. v. Lynch*, [1975] A.C. 653, 670 (Morris, L.J.); MODEL PENAL CODE § 2.09, Comment (Tent. Draft No. 10, 1960); CONN. GEN. STAT. ANN. § 53a-14 (West 1972); N.Y. PENAL LAW § 40.00 (McKinney 1975); Note, *supra* note 87, at 1506.

123. The approach suggested here is actually far less discretionary than that suggested elsewhere. Several scholars have suggested that in determining whether the duress was sufficient to excuse the actor's conduct, the court should focus on the particular capacities of the defendant, rather than employing standards such as "the reasonable man." See Fletcher, *supra* note 16; Newman & Weitzer, *supra* note 32.

But juries undertake similar inquiries in many cases.¹²⁴ More important, the rigid guidelines of the current approach may belie its application in practice. If the law does not reflect the community's sense of justice, many cases will be screened out by police officers or prosecutors, or will result in acquittals because juries will temper the law's effect.¹²⁵ The proposed modification adds no discretion to the system, and is a more open approach for the law to take.¹²⁶

Taken together, the compulsion and choice of evils defenses proposed here would cover all three of the fact situations identified in the theoretical framework. Both defenses are limited by a concept that is central to criminal law — the reasonable man. They thus harmonize the current formulation of the necessity defense with generally accepted principles without departing radically from those principles.

II. APPLICATION OF THE PROPOSED DEFENSES TO DEPROGRAMMING CASES

A. *Deprogramming and the "Choice of Evils" Defense*

Actors may successfully advance the choice of evils defense only if they entertained an honest and reasonable belief that the harm likely to be avoided by deprogramming clearly outweighed the harm likely to be caused.¹²⁷ Several problems inhere in such a balancing process. First, the variety of cult practices, deprogramming therapies, and experiences of individual cult members renders meaning-

124. For example, juries are entrusted with the task of deciding whether there is sufficient provocation to reduce a charge of murder to manslaughter. Similarly, cases involving a determination of negligence turn on an assessment of how a "reasonable man" would behave in a particular factual situation. See generally W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 32 (4th ed. 1971).

125. See Arnolds & Garland, *supra* note 11, at 298. These informal methods of deciding controversies are particularly evident in deprogramming situations, where law enforcement officials have been extremely reluctant to impose punishment on parents. See Le Mault, *supra* note 4, at 608; Note, *supra* note 4, 53 N.Y.U. L. REV. at 1253 ("The element of state action in self-help situations was passive: police declined to intervene, viewing the kidnappings as 'family matters' best resolved outside the courts; grand juries refused to indict and petit juries to convict the abductors.") (footnotes omitted).

126. As an alternative to exculpating defendants, courts might consider the defense outlined here to be simply a basis for mitigation of punishment. The justification for this approach would be that the perceived injustice of imposing penalties on actors who were influenced by substantial external pressures is outweighed by the need to deter illegal conduct. By making compulsion a basis for mitigation, courts would recognize that compelled actors are not as blameworthy as actors who violated the law without external pressures, but would also retain some penalty in the hope of deterring violations of the law. The same approach might be taken for actors who establish an "imperfect" compulsion defense — *i.e.*, the pressures were sufficient to meet the first two tests suggested earlier, but the actor's response to the pressure was not understandable. LaFave and Scott have suggested that an actor killing under duress might be convicted of manslaughter rather than murder, and this approach has been followed in two state codes. See W. LAFAVE & A. SCOTT, *supra* note 12, at 585.

127. See text following note 54 *supra*.

less many general conclusions regarding the harms caused and avoided.¹²⁸ Second, average defendants may not fully appreciate the scope of the harms caused or may consider certain "harms" as avoided when, in legal contemplation, no "harm" exists. Reasonable normative mistakes¹²⁹ of this kind should preclude punishment.

This section attempts to address these problems. After surveying the possible harms caused and avoided by deprogramming, it considers the possibility that the actor made a reasonable normative mistake. Finally, the section examines the relevance of legal alternatives to deprogramming. It concludes that the choice of evils defense will rarely avail defendants in deprogramming cases.

1. Harms Caused

Attempts to deprogram cult members are likely to cause two general types of harms.¹³⁰ The most obvious is violation of the criminal laws that prohibit the various actions of deprogrammers. These criminal aspects of deprogramming vary little from case to case: Most deprogrammings involve abducting the cult member and confining him for several days.¹³¹ The range of crimes involved may thus be said "to involve kidnapping at the very least, quite often assault and battery, almost invariably conspiracy to commit a crime, and illegal restraint."¹³² Deprogrammers attempt to discount the magnitude of these harms by arguing that deprogramming is temporary and benevolently motivated.¹³³ They also point to former cult members' thankful declarations as proof that deprogramming is, on balance, beneficial.¹³⁴ It is difficult, however, to appreciate the relevance of such expressions of gratitude.¹³⁵ And neither its temporary

128. Anthony, *The Fact Pattern Behind the Deprogramming Controversy: An Analysis and an Alternative*, 9 N.Y.U. REV. L. & SOC. CHANGE 73, 80 (1980) ("Much of the disagreement about the mental health effects of the movements results because people are comparing entirely different entities. One of the clearest generalizations that emerges from studies of these effects is that the mental health implications of unconventional religions vary tremendously from group to group."); *Panel Discussion*, *supra* note 9, at 116.

129. See text at note 22 *supra*.

130. Harms to the individual from deprogramming are discussed at note 180 *infra*.

131. See note 8 *supra* and accompanying text. For a more graphic description of the deprogramming process, see Affidavit of Walter Robert Tayler, *In re Guardianship of Walter Tayler*, No. P-76-1228 (Okla. Co. P. Ct. Aug. 12, 1978), reprinted in *Deprogramming: Documenting the Issue*, *supra* note 8, at 65-67 ("My monastic clothes were ripped off me while four persons held me down. My cross or crucifix was taken away from me. . . . Mr. Howard discussed his sexual exploits and fornications and encouraged me to have sexual intercourse.").

132. T. PATRICK & T. DULACK, *supra* note 7, at 63.

133. See T. PATRICK & T. DULACK, *supra* note 7, at 77.

134. See, e.g., *Panel Discussion*, *supra* note 9, at 106 (statement of Marcia Rudin). Patrick claims a success rate of over 90% (with "success" presumably demonstrated by a decision not to return to the cult). Note, *supra* note 4, 15 NEW ENG. L. REV. at 152 n.147. Such claims are obviously highly self-serving, but, unfortunately, the accuracy of this estimate has not been objectively evaluated by researchers.

135. The laws violated by deprogrammers, of course, do not function solely to protect cult

nature nor its benevolent purpose are legally acceptable justifications for criminal conduct.¹³⁶

Less obvious, but no less significant than the criminal violations, is the threat that deprogramming poses to freedom of religion.¹³⁷ Most of the characteristics of cult membership on which deprogrammers rely to justify their activities — isolation from the rest of society, devotion to the cult as a surrogate family, and adherence to peculiar beliefs and practices — are precisely those that give rise to first amendment interests.¹³⁸ Because the dogma of most cults is "sincere and meaningful" and "occupies in the life of its possessor a place parallel to that filled by" conventional notions of a divine being,¹³⁹ the first amendment fully protects the beliefs and practices of cult members.¹⁴⁰ Interference with those beliefs and practices directly affects deprogrammed individuals, and also harms the cults.¹⁴¹ In addition to depriving cults of members' services and support, deprogramming may generate a chilling effect that hampers their

members. See W. LAFAVE & A. SCOTT, *supra* note 12, at 408. See also J. HALL, *supra* note 18, at 217. Moreover, these declarations may come from former cult members who have accepted the arguments of deprogrammers as a means of rationalizing their earlier involvement in the cult. See note 180 *infra*.

136. See Part I, Section B *supra*.

137. See, e.g., Comment, *supra* note 4, 13 HARV. C.R.-C.L. L. REV. 751; Note, *supra* note 4, 53 N.Y.U. L. REV. at 1248 n.8.

138. See *Wisconsin v. Yoder*, 406 U.S. 205, 227 (1972) (holding that application to Amish sect of compulsory school attendance laws amounted to "severe interference with religious freedom"). In *Yoder*, the Court was careful to rely on the long history and apparent sincerity of the Amish sect, as well as the convincing demonstration that the sect's practices complemented, rather than frustrated, the underlying purpose of compulsory school attendance laws. Nevertheless, it would be difficult to distinguish on a principled basis the Amish lifestyle from cult lifestyles. In both, "religion pervades and determines virtually [the] entire way of life, regulating it with the detail of the Talmudic diet through the strictly enforced rules of the church community." 406 U.S. at 216. Further, the Court noted in *Yoder* that forcing the sect to conform with the law in question posed "a very real threat of undermining the Amish community and religious practice as it exists today; they must either abandon belief and be assimilated into society at large, or be forced to migrate to some other . . . more tolerant region." 406 U.S. at 218. The same observation can be made with respect to many modern day cults vis-à-vis deprogramming.

139. *United States v. Seeger*, 380 U.S. 163, 176 (1965).

140. See *Torcaso v. Watkins*, 367 U.S. 488, 493 (1961) (invalidating state statute requiring declaration of belief in God as condition for holding public office).

141. The Supreme Court held long ago: "The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect. The right to organize voluntary religious associations to assist in the expression and dissemination of any religious doctrine . . . is unquestioned." *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 728-29 (1872), quoted in *Serbian Orthodox Diocese v. Milivojevic*, 426 U.S. 696, 710-11 (1975).

As a general matter, the Court has long viewed a group's constitutional rights as indistinguishable from that of its members. See, e.g., *Cousins v. Wigoda*, 419 U.S. 477, 487-88 (1975); *NAACP v. Button*, 371 U.S. 415, 431 (1963); *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957) (plurality). Interference with a cult member's practice of religious beliefs is, therefore, simultaneously an interference with the rights of the cult, because the rights of the cult and the cult member in connection with the free exercise of religious beliefs "are in every practical sense identical." *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 459 (1958).

recruiting efforts.¹⁴² It is thus likely to injure substantially first amendment interests.

The nature of the two interests threatened by deprogramming is such that courts should not allow the "success" of a particular attempt to mitigate the harms caused. The laws that deprogrammers violate exist not only to protect individual cult members, but also because society has an interest in discouraging parents, friends, and deprogrammers from taking the law into their own hands regardless of the likelihood that they would succeed. As a practical matter, moreover, courts will encounter only cases where the deprogramming failed. The difficulties in attempting to make a post hoc assessment of the likelihood of success and the absence of objective data regarding success rates counsel against exculpating defendants on the basis of fact-specific inquiries into the likelihood that they would succeed.¹⁴³

2. Harms Avoided

Although its proponents argue that deprogramming avoids a wide variety of evils,¹⁴⁴ one factor — the member's capacity to consent to the harms alleged — significantly affects the weight that courts should give to them. Most of these evils necessitate intervention only if the cult member was incapable of voluntarily assenting to them. No compelling reason supports the choice of evils defense where the member voluntarily chose to accept the cult's living conditions.¹⁴⁵ Indeed, there appear to be no necessity cases in which a party who sought to protect a third person from a voluntarily assumed harm raised the defense.¹⁴⁶ Our society attaches great value to individual freedom, and deprogrammers impose substantial

142. This sort of inquiry was specifically cited as one factor establishing the right of a civil rights group to assert the constitutional rights of its members in *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 459-60 (1958).

143. Such an inquiry would require some objective data regarding the "success" rate of deprogramming. To date, only self-serving claims of success have been made by deprogrammers. See note 134 *supra*.

144. For critical analyses of cults, see sources cited in note 4 *supra*.

145. Certain consensual harms, however, may be serious enough to warrant intervention and justify application of the choice of evils defense. One can imagine, for example, the choice of evils defense being raised where the actor sought to prevent drug abuse or suicide.

146. There are two cases that arguably present such a situation. In *Leigh v. Gladstone*, 26 T.L.R. 139 (K.B. 1909), the court held that prison officers who forcibly fed a prisoner on a hunger strike to protect her health had acted lawfully. It has been suggested, however, that the benefit justifying this action was the need for prison discipline, and hence the case "is not authority for any wider principle that injury may lawfully be caused to save a person from himself." Glazebrook, *supra* note 11, at 99. See G. WILLIAMS, *supra* note 18, at § 234. In *Humphries v. Connor*, 17 Ir. C.L.R. 1 (Q.B. 1864), the defendant constable had removed an emblem from a person, because the emblem offended several persons nearby. The constable claimed that he removed the emblem to protect the wearer. The court acquitted the constable because "it was defendant's duty as a constable to preserve the public peace, and to prevent the breach of it by disturbance or otherwise." 17 Ir. C.L.R. at 6 (O'Brien, J.). Hence, the court

harms when they deprive cult members of their free choice.¹⁴⁷

The belief that deprogramming avoids nonconsensual harms is based on the premise that consent requires simultaneous capacity and knowledge.¹⁴⁸ Cults may deceive potential members, and prevent them from obtaining the knowledge required for consent.¹⁴⁹ And some cults use manipulative techniques — frequently described as “coercive persuasion,” “thought control,” or “brainwashing” — that may prevent recruits from having the capacity to consent once they have been given sufficient information.¹⁵⁰ The deprogrammers’ primary argument, then, is that cults manipulate or brainwash recruits into adhering to cult dogma.¹⁵¹

suggested that the benefit justifying intervention was the need for public order, rather than a specific need to protect the defendant.

Glazebrook suggests that necessity is not applicable to rescuers who act against the consent of the rescued party. Glazebrook, *supra* note 11, at 98-99. Elsewhere it has been suggested that necessity would be applicable if a defendant prevented another person from attempting to commit suicide.

147. See generally J. MILL, *ON LIBERTY* (London 1859).

148. Delgado, *supra* note 4, at 49.

149. C. STONER & J. PARKE, *ALL GOD’S CHILDREN* 61 (1977) (“cult recruiters may carefully avoid or even deny the group is a religion”). But see Robbins, in *Panel Discussion*, *supra* note 9, at 95.

150. See Delgado, *supra* note 4, at 54-56.

151. See Delgado, *Ascription of Criminal States of Mind: Towards a Defense Theory for the Coercively Persuaded (“Brainwashed”) Defendant*, 63 MINN. L. REV. 1, 1-6 (1978), for an attempt to analyze the factors involved in coercive persuasion. For the most comprehensive treatment of the brainwashing argument as applied to cults, see Delgado, *supra* note 4. See also VERMONT GENERAL ASSEMBLY, REPORT OF THE SENATE COMMITTEE FOR THE INVESTIGATION OF ALLEGED DECEPTIVE, FRAUDULENT AND CRIMINAL PRACTICES OF VARIOUS ORGANIZATIONS IN THE STATE 5 (Jan. 1977) [hereinafter cited as VERMONT SENATE COMM.].

At least one “cult” has taken legal action in response to criticism in the popular press. Reverend Sun Myung Moon’s Unification Church filed a libel suit that resulted in “one of the longest civil trials in recent British history.” N.Y. Times, Apr. 1, 1981, at 4, col. 1. The paper had warned that the Church “woos to its ways young people who walk out on their everyday lives, leave behind families in despair.” A parent of a former Church member described the members as “robots, glassy-eyed and mindless, programmed as soldiers in this vast fund-raising army with no goals or ideas, except as followers of the half-baked ravings of Moon, who lived in splendor while his followers lived in forced penury.” *Id.*, at 1, col. 2, and at 4, col. 1. After hearing 117 witnesses during the five-month trial, the jury “ordered the group (i.e., the Unification Church) to pay court costs estimated at nearly \$2 million [and] also unanimously recommended that the church’s tax-free status ‘be investigated by the Inland Revenue Department on the grounds that it is a political organization.’” *Id.*, at 1, cols. 1-2.

The brainwashing issue has also received judicial attention. In *Peterson v. Sorlien*, 299 N.W.2d 123 (1980), *cert. denied*, 450 U.S. 1031 (1981), the Minnesota Supreme Court rejected a cult member’s false imprisonment claim against her parents because of the cult’s coercive methods. 299 N.W.2d at 128-29. Another court seemed to accept the notion that brainwashing was a possibility in cult settings, but concluded that brainwashing was not actionable. *People v. Murphy*, 98 Misc. 2d 235, 243, 413 N.Y.S.2d 540, 545 (1977). See also *Helander v. Unification Church*, 1 Fam. L. Rep. 2797 (D.C. Super. Ct., Family Div. Sept. 23, 1975). Other courts have suggested that the evidence is not conclusive either way. See *Turner v. Unification Church*, 473 F. Supp. 367, 376 (D.R.I. 1978), *aff’d*, 602 F.2d 458 (1st Cir. 1979); *Katz v. Superior Court*, 73 Cal. App. 3d 952, 980-81, 141 Cal. Rptr. 234, 251 (1977). See also 123 CONG. REC. 27,091 (1977) (Department of Justice takes position that “evidence that sect members do not have the capacity to exercise a free will is inconclusive”).

The effectiveness of thought control techniques is poorly understood,¹⁵² but scholars are increasingly recognizing the possibility of manipulation.¹⁵³ New recruits are often quite suggestible,¹⁵⁴ and the cult experience is frequently designed to reduce drastically the resistance of recruits to indoctrination.¹⁵⁵ As a result, cult leaders may substantially influence recruits' thinking.¹⁵⁶ These factors led the New York Charity Frauds Bureau to conclude, after investigating

152. See Reich, *Brainwashing, Psychiatry, and the Law*, 39 PSYCH. 400, 402-03 (1976); Shapiro, *Destructive Cultism*, AM. FAM. PHYSICIAN, Nov. 1977, at 83 (suggesting that further research on the prevention of "destructive cultism" and treatment is necessary). Doubt has also been expressed concerning the possibility of resolving questions about brainwashing in a courtroom. See Dressler, *Professor Delgado's "Brainwashing" Defense: Courting a Determinist Legal System*, 63 MINN. L. REV. 335, 354-56 (1979); Reich, *supra*. But see Delgado, *supra* note 151, at 26-27.

153. See sources cited in Delgado, *supra* note 151, at 1-3 nn.1-11 & 16. Delgado claims that the existence of thought control "is attested to by voluminous accounts of those who have experienced it, as well as reports of scientific investigators who have studied it. The body of professional literature related to thought reform is extensive." *Id.* at 22-23 (footnotes omitted).

154. Many recruits are experiencing emotional problems before becoming involved with the cult. See Clark, *supra* note 2, at 279-80. Some cults deliberately seek out emotionally disturbed individuals. Peterson v. Sorlien, 299 N.W.2d 123, 130 (Minn. 1980), *cert. denied*, 450 U.S. 1031 (1981). Other recruits desire precisely the sort of lifestyle that cults appear to offer—an opportunity to devote their lives to God, to work for socially desirable causes, and to live in a communal setting. J. MACCOLLAM, *supra* note 2, at 19. Their resulting eagerness to accept the cult's doctrine is increased by the friendliness and enthusiasm of the other members. See Levine, *supra* note 2, at 35; Lofland, *"Becoming a World-Saver" Revisited*, 20 AM. BEHAVIORAL SCI. 805, 811-13 (1977). The recruits' desire to be part of the group, at least for a few days, may prevent them from critically analyzing the doctrines to which they are exposed.

155. The techniques used by cults include a rigorous daily routine designed to exhaust the recruits physically, Lofland, *supra* note 154, at 810, ceremonies designed to produce emotional euphoria, see, e.g., F. CONWAY & J. SPIEGELMAN, SNAPPING (1978), and deprivation of food and sleep, see T. PATRICK & T. DULACK, *supra* note 7, at 75-76. Some cults go to great lengths to prevent recruits from spending any time alone because this would give them an opportunity to consider more carefully the information to which they are being exposed. Levine, *supra* note 2, at 35; Rudin, *supra* note 2, at 19.

156. The cumulative effect of the cults' techniques may leave the recruits' minds in a state of dissociation. See F. CONWAY & J. SPIEGELMAN, *supra* note 155, at 184; Clark, *supra* note 2, at 280; Rudin, *supra* note 2, at 19-20. At this point, cult leaders can exert substantial influence over recruits' thinking. The leaders completely control the information that the recruits receive and the means of exposure. See generally Lofland, *supra* note 154, at 809-11. Recruits are encouraged to stop questioning the information and to accept the cult's doctrines and lifestyle. F. CONWAY & J. SPIEGELMAN, *supra* note 155, at 57; Delgado, *supra* note 4, at 14. The recruits' identification with, and acceptance of, their new environment is also fostered by attempts to isolate them from their past and the outside world. See *Investigating the Effects of Some Religious Cults on the Health and Welfare of their Converts* (statement of John Clark to the Vermont Senate Comm. for the Investigation of Alleged Deceptive, Fraudulent and Criminal Practices of Various Organizations in the State) (Aug. 18, 1976); Lofland, *supra* note 154, at 810. After the recruits have accepted the cult, loyalty may be maintained by manipulating the members' feelings of guilt, see Levine, *supra* note 2, at 36; Rudin, *supra* note 2, at 26, and fear, see VERMONT SENATE COMM., *supra* note 151; California Senate Select Comm. on Children and Youth, *Hearing on the Impact of Cults on Today's Youth* 27 (Aug. 24, 1974); Lofland, *supra* note 154, at 813; Singer, *Coming Out of the Cults*, PSYCH. TODAY, Jan. 1979, at 72, 79, and by establishing a very regimented lifestyle within which the member has little reason or opportunity to question the cult, see Delgado, *supra* note 4, at 24; Singer, *supra*, at 76. Moreover, because new members have lost touch with the outside world, they may become psychologically dependent on the cult during their continued devotion. See Clark, *supra* note 2, at 280.

the Children of God, that the group had employed "brainwashing techniques" to accomplish "a total assault on the psyche" of its members.¹⁵⁷ Similarly, the Minnesota Supreme Court, in rejecting a Way International member's claim that her deprogramming constituted false imprisonment, stated that the group's members suffered a "severe impairment of autonomy and ability to think independently."¹⁵⁸

Other scholars have challenged these views of the cult indoctrination process.¹⁵⁹ They suggest that the cults' techniques do not differ significantly from those of some traditional religions¹⁶⁰ and other institutions.¹⁶¹ Critics of deprogramming also object to the use of terms such as "brainwashing" because acceptance of this view of conversion may rationalize religious persecution.¹⁶² These scholars question the cults' ability to brainwash members,¹⁶³ and suggest that acceptance of a cult's lifestyle does not evince brainwashing: Many individuals may, consciously or subconsciously, seek out an authori-

157. NEW YORK ATTORNEY GENERAL, FINAL REPORT ON THE ACTIVITIES OF THE CHILDREN OF GOD 31.

158. *Peterson v. Sorlien*, 299 N.W.2d 123 (Minn. 1980), *cert. denied*, 450 U.S. 1031 (1981).

159. See Anthony, *supra* note 128, at 79; Robbins, *Religious Movements, the State, and the Law: Reconceptualizing "the Cult Problem,"* 9 N.Y.U. REV. L. & SOC. CHANGE 33 (1980); Robbins & Anthony, *New Religions, Families and Brainwashing*, SOCIETY, May-June 1978, at 77-78; Robbins, Anthony & Richardson, *Theory and Research on Today's New Religions*, 39 SOC. ANALYSIS 95, 111 (1978); *Deprogramming: Documenting the Issue*, *supra* note 8.

160. See, e.g., Robbins & Anthony, *supra* note 159, at 79:

The logic [of the deprogramming advocates'] argument, then, would lead either to legal suppression of monasteries, fraternities, the Boy Scouts, and Alcoholics Anonymous, or to granting courts a discretionary authority in suppressing membership in voluntary associations, which is inconsistent with our legal traditions.

See generally E. ANDREWS, *THE COMMUNITY INDUSTRIES OF THE SHAKERS* 12-13 (1933); W. JAMES, *THE VARIETIES OF RELIGIOUS EXPERIENCE* (1902).

[The Shakers] consecrated themselves and their property to God, holding all their goods in common but owning nothing; . . . they led celibate lives; . . . they were the recipients of strange visions and the first spiritualists in America; . . . early meetings were characterized by unrestrained emotions and unbridled ecstasies of spirit and body; . . . they did not vote nor run for public office . . . [They] considered themselves a body of saints, whose mission it was to redeem themselves and others from the sins of worldliness and carnal nature.

E. ANDREWS, *supra*, at 12-13.

161. Robbins & Anthony, *supra* note 159, at 79.

162. See Robbins & Anthony, *supra* note 159, at 78; Shupe, Spielmann & Stigall, *Deprogramming: The New Exorcism*, 20 AM. BEHAVIORAL SCI. 941, 951 (1977); Szasz, *Patty Hearst's Conversion: Some Call it Brainwashing*, THE NEW REPUBLIC, Mar. 6, 1976, at 10.

163. See Szasz, *supra* note 162, at 10-11.

Like many dramatic terms, "brainwashing" is a metaphor. A person can no more wash another's brain with coercion or conversation than he can make him bleed with a cutting remark. If there is no such thing as brainwashing, what does this metaphor stand for? It stands for one of the most universal human experiences and events, namely for one person influencing another. However, we do not call all types of personal or psychological influences "brainwashing." We reserve this term for influences of which we disapprove.

Id. at 11. For a brief account of the historical development of the term "brainwashing," see Note, *supra* note 4, 18 ARIZ. L. REV. at 1124-32.

tarian lifestyle.¹⁶⁴

The issue that emerges from this debate is one over which, as one court has noted, "[r]easonable minds could differ,"¹⁶⁵ but courts should not consider brainwashing itself as a harm avoided by deprogramming. The recruiting and indoctrinating activities that critics label brainwashing constitute protected advocacy of religious beliefs.¹⁶⁶ The brainwashing argument may assume that there are "normal" religious beliefs and "constructive" religious practices from which cults deviate and that deprogramming allows individuals to appreciate.¹⁶⁷ It also assumes that some individuals are capable of influencing others in a manner so clearly contrary to their best interests that it is permissible to restrict the influence.¹⁶⁸ It overlooks, however, the Supreme Court's consistent rejection of both the former¹⁶⁹ and the latter¹⁷⁰ assumptions.

Brainwashing itself is not cognizable as a harm avoided by deprogramming, but cult membership may subject individuals to several other types of harm as well. Courts should thus consider whether these alleged harms are sufficiently serious to warrant intervention. Deprogrammers argue first that cults defraud members into devoting their efforts, if not their lives, to activities that merely ag-

164. See Robbins & Anthony, *supra* note 159, at 82.

165. Katz v. Superior Court, 73 Cal. App. 3d 952, 981, 141 Cal. Rptr. 234, 251 (1977).

166. These activities may, however, be subjected to reasonable time, place, and manner restrictions. See *Heffron v. International Socy. for Krishna Consciousness, Inc.*, 101 S. Ct. 2559, 2566 (1981) (holding that state fair rule limiting solicitation to stationary booths on fair-ground premises does not violate first amendment; peripatetic solicitation ritual has "no special claim to First Amendment protection as compared to that of other religions who also distribute literature and solicit funds").

167. The assumption is implicit. Although a deprogrammer might not attempt to reprogram a cult member into any particular religious school, see T. PATRICK & T. DULACK, *supra* note 7, at 77 ("Once . . . deprogrammed [a cult member] is absolutely free to do whatever he wants to do."), the very act of deprogramming implies that a cult member's current religious views are "wrong" or not what the cult member would choose if he or she were exercising "free will." See also Robbins, *supra* note 159, at 38 ("the concepts of mind control and brainwashing . . . mask a latent concern for the deviant contents of beliefs and bizarre results").

168. This assumption is also implicit. See T. PATRICK & T. DULACK, *supra* note 7, at 20 ("Moon's a crook, plain and simple. They're all crooks. You name 'em. Hare Krishna. The Divine Light Mission. Guru Maharaj Ji. The New Testament Missionary Fellowship. Brother Julius. Love Israel. The Children of God. Not a brown penny's worth of difference between any of 'em.").

169. See *West Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (striking down state statute requiring flag salute as violative of first amendment as applied to children whose religion prohibited such displays of nationalism and patriotism).

170. See, e.g., *Cantwell v. Connecticut*, 310 U.S. 296, 310 (1940):

In the realm of religious faith, and in that of political belief, sharp differences arise. In both fields the tenets of one man may seem the rankest error to his neighbor. To persuade others to his own point of view, the pleader, as we know, at times, resorts to exaggeration, to vilification of men who have been, or are, prominent. . . . But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy.

grandize cult leaders.¹⁷¹ Although there may be some truth to this charge,¹⁷² the government lacks authority to challenge solicitation of funds on the ground that the cult's dogma is false.¹⁷³ Because the Constitution forbids state interference with cults' fund-raising activities, private individuals cannot claim that courts should weigh such activities on the harm avoided side of the choice of evils balance.¹⁷⁴

Deprogrammers argue, and some evidence suggests, that cult indoctrination methods can cause serious psychological damage. Many members appear unable to exercise independent judgment,¹⁷⁵ and some research indicates that they may suffer serious, and perhaps permanent, cognitive damage.¹⁷⁶ Cult members' apparent dissociation,¹⁷⁷ however, does not differ substantially from euphoric states that result from other, well-accepted religious activities.¹⁷⁸ Listlessness, lethargy, and an inability to direct one's personal affairs without guidance are surely unfortunate, but not serious enough to justify forcible deprogramming. There is respectable evidence, moreover, that for some individuals cult membership may be psychologically beneficial,¹⁷⁹ and deprogramming psychologically damaging.¹⁸⁰ Finally, since states have generally declined to regulate cult practices to protect the psychological well-being of members,¹⁸¹

171. See Delgado, *supra* note 4, at 44-45.

172. See, e.g., Rudin, *supra* note 2, at 27 n.66 (collecting topical newspaper accounts of the opulent lifestyle of many cult leaders).

173. United States v. Ballard, 322 U.S. 78, 86-88 (1944). See *Schaumburg v. Citizens for Better Environment*, 444 U.S. 620, 632, 637 (1980).

174. See text at notes 55-57 *supra*.

175. See Delgado, *supra* note 4, at 21-22; Shapiro, *supra* note 152, at 83.

176. See VERMONT SENATE COMM., *supra* note 151 (statement of John Clark); Clark, *supra* note 2, at 281; Delgado, *supra* note 4, at 14-15; Levine, *supra* note 2, at 36.

177. See note 156 *supra*.

178. See, e.g., W. JAMES, *supra* note 160, at 62-77.

179. Research by Ungerleider and Wellisch led them to conclude that "[n]o data emerged from intellectual, personality, or mental status testing to suggest that any of these subjects are unable or even limited in their ability to make sound judgments and legal decisions as related to their persons and property." Ungerleider & Wallisch, *Coercive Persuasion (Brainwashing), Religious Cults, and Deprogramming*, 136 AM. J. PSYCH. 279, 281 (1979). Other researchers have reported a reduction in neurotic stress as a result of cult membership. Galanter, Rabkin, Rabkin & Deutsch, *supra* note 4, at 168 ("Affiliation with the Unification Church apparently provided considerable and sustained relief from neurotic distress.").

180. Because deprogramming provides former cult members with a means to deny personal responsibility for their involvement with the cult, it may be a harmful type of therapy; former members may be better off if they come to grips with the personal reasons that led them to accept the cult's authoritarian lifestyle. See *Panel Discussion*, *supra* note 9, at 117, 120-21 (statement of Dick Anthony); Anthony, *supra* note 159, at 86. The risks of deprogramming are exacerbated by the questionable qualifications of many of those involved and the possibility that some deprogrammers are financially, rather than benevolently, motivated, see Gutman, *Constitutional and Legal Dimensions of Deprogramming*, in *Deprogramming: Documenting the Issue*, *supra* note 8, at 209. But see T. PATRICK & T. DULACK, *supra* note 7, at 159.

181. Most states have statutes that allow for the appointment of guardians or conservators for those individuals incapable of managing their own property or affairs. At least one court decision involving deprogramming has held a conservatorship statute unacceptably vague in-

it is not clear that the legislatures would condone deprogramming for that purpose.¹⁸² Courts should, therefore, treat psychological problems as a harm avoided only where, under conventional standards of legal competency, the cult member was incapable of exercising independent judgment.

Deprogramming may also avert physical injuries that some cult members suffer. The rigorous routine,¹⁸³ and dangerous activities of many cults,¹⁸⁴ combined with inadequate nutrition, lack of sleep, and substandard living quarters, can jeopardize their members' physical health. The aversion of some cults to medical care magnifies this risk.¹⁸⁵ And preventing physical injury, particularly if permanent, falls within the scope of state police power¹⁸⁶ because the value that society places on human life outweighs the value of unfettered practice of religious beliefs.¹⁸⁷ It is reasonable, therefore, to argue that a deprogrammer may intervene, as the state's "agent," to prevent serious physical injury.¹⁸⁸

sofar as it allowed for the appointment of a conservator whenever the prospective conservatee "was likely to be deceived or imposed upon by artful or designing persons." *Katz v. Superior Court*, 73 Cal. App. 3d 952, 141 Cal. Rptr. 234, 240 n.5 (1977). The *Katz* court stated that "in the absence of such actions as render the adult believer himself gravely disabled as defined in the law of this state, the processes of this state cannot be used to deprive the believer of his freedom of action and to subject him to involuntary treatment." 73 Cal. App. 3d at 989, 141 Cal. Rptr. at 256.

182. The defendant invoking the choice of evils defense is not free to define subjectively the sorts of harms that might justify violating the law; the applicability of the defense depends upon whether it is reasonable to believe that the legislature would condone violating the law to prevent the harm in question. See text at notes 55-57 *supra*. It is not clear that the state could "police" the psychological well-being of cult members by regulating the practices that deprogrammers claim are injurious enough to justify deprogramming. Although the state can intervene to protect children and others incapable of caring for themselves, see *Prince v. Massachusetts*, 321 U.S. 158, 166-67 (1944), the Supreme Court has stated that in cases where a free exercise claim has been rejected that "[t]he conduct or actions so regulated have invariably posed some substantial threat to *public safety, peace or order*." *Sherbert v. Verner*, 374 U.S. 398, 403 (1963) (emphasis added). See *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972). It is thus far from clear that the state could regulate or restrict religious practices to prevent psychological harms that neither threaten the general welfare nor directly endanger the cult member's physical well-being.

183. See note 155 *supra*.

184. See, e.g., note 196 *infra*.

185. See *Clark, supra* note 2, at 280; *Delgado, supra* note 4, at 19; *Rudin, supra* note 2, at 31-32 (concluding that cult membership "may be threatening to life itself").

186. See, e.g., *Cantwell v. Connecticut*, 310 U.S. 296, 308 (1940); *Reynold v. United States*, 98 U.S. 145, 163 (1879).

187. State regulation of practices that endanger health has long been justified on the ground that the free exercise of religion "embraces two concepts, — freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be." *Cantwell v. Connecticut*, 310 U.S. 296, 303-04 (1940).

188. The more difficult question is what degree of physical harm is required before forcible intervention is justified. Not all physical harms would "clearly outweigh" the harms caused by deprogramming. Inadequate sleep or a less than optimal diet would seem insufficient to justify deprogramming because, as a general matter, these conditions do not threaten irreparable injury. But practices that may lead to irreparable physical injury should justify intervention.

There may also be a distinction between abduction and confinement and deprogramming.

3. *The Reasonable Belief Requirement and Alternatives to Deprogramming*

To assert the choice of evils defense successfully, defendants must have reasonably believed that deprogramming was necessary and that the harms likely to be avoided clearly outweighed the harms likely to be caused.¹⁸⁹ Because the average defendant may tend to underestimate the harms caused by deprogramming and overestimate the harms avoided, defendants may be able to argue convincingly that they made a reasonable normative mistake in balancing the harms. Proper instructions, however, will minimize the possibility that juries will exculpate defendants whose mistake was unreasonable. Courts should instruct juries to apply the same standard of reasonableness used in other areas of the law.¹⁹⁰ Under this standard, most parents will be held criminally liable for deprogramming except where deprogramming *is* clearly justified. And professional deprogrammers, who are required by the reasonable man standard to use any special skill, knowledge, or experience that they possess or should possess, will almost never be exonerated.

At a minimum, the reasonable belief requirement demands some investigation of the practices of the particular cult in question and of their effects on the individual to be deprogrammed. Because cult practices and the experiences of individual members vary widely,¹⁹¹ general information will not suffice; defendants must demonstrate that they had specific grounds for believing that deprogramming was clearly justified. But contact between the parent and the cult member might have suggested that the child is incapable of exercising independent judgment,¹⁹² or that cult membership threatens serious and irreparable injury.¹⁹³ Parents may also receive mail from the child that is so out of character that it provides a reasonable ground to believe that his faculties have deteriorated.¹⁹⁴ And parents' suspicions may reasonably be aroused by cults' efforts to prevent contact with their children.¹⁹⁵ The parents' beliefs, based on these observa-

Although abduction might be necessary in some cases to prevent the cult member from physical harm, the need for deprogramming is less clear. Many observers point out that deprogramming is as coercive as the practices that the cults allegedly engage in. See Sage, *The War on Cults*, HUMAN BEHAVIOR, Oct. 1976, at 40, 45; Shupe, Spielman & Stigall, *supra* note 162, at 951; Deprogramming: Documenting the Issue, *supra* note 8, at 195 (statement of Allen Gerson).

189. See text following note 54 *supra*.

190. See, e.g., W. PROSSER, THE LAW OF TORTS 345 (1971).

191. See text at note 128 *supra*.

192. See Clark, *supra* note 2, at 280. Members have been described as appearing glassy-eyed and constantly smiling. See Shapiro, *supra* note 152, at 83.

193. See notes 175-76 *supra* and accompanying text.

194. See Delgado, *supra* note 4, at 18 n.102.

195. See Rudin, *supra* note 2, at 28 ("Families often are prevented from locating or communicating privately with their loved ones."). Joel MacCollam asks:

tions, may be reinforced by information about the cult. Evidence from former cult members, for example, may indicate that the cult's activities seriously threaten members' health. If defendants produce substantial evidence of this type, there may be a reasonable basis for their belief that cult membership is harmful, and that the child is incapable of preventing or consenting to the harm.¹⁹⁶

Even in cases where intervention appears warranted, parents and deprogrammers must search for viable legal alternatives. In most states, judicial conservatorships or guardianship proceedings are available to parents and friends of cult members.¹⁹⁷ A number of parents have used these proceedings successfully.¹⁹⁸ Where such proceedings are available, failure to use them should ordinarily lead courts to deny the choice of evils defense. Only if defendants can demonstrate that resort to legal proceedings would not prevent serious injury to the cult member should courts accept the defense.

The choice of evils defense will thus rarely exonerate parents of adult cult members, and will virtually never exonerate professional deprogrammers. Deprogramming constitutes a clearly lesser evil only if the cult member appears incapable of exercising independent judgment or risks severe physical injury. Even in these situations, courts should reject the defense if viable legal alternatives were available.

If the children are indeed *not* victims of mind control but are in a totally voluntary association with the religious group, why are the cults so adverse to offering a "cooling off" period where the convert can go home and prove to his parents that he is not at all a victim of coercion but actually acting out of his own free will?

J. MACCOLLAM, *supra* note 2, at 141 (emphasis in original).

196. An example of such a situation is the Washington deprogramming case, where the defense claims the parents' beliefs were based in large part on (1) the mother's visit to the cult, during which the mother found her daughter to be suffering from a disease that severely disfigured her face; the daughter first agreed to go to a doctor, but then declined after the cult leader denied permission, Memorandum For Defendant at 8, *United States v. Patrick*, No. CR74-320S (W.D. Wash. Dec. 11, 1974); (2) later letters from the parents were returned marked "refused" or "addressee unknown," *id.*; (3) reports indicated that two cult members had died after sniffing, from plastic bags, a substance called toluene, *id.* at 9; a former cult member informed the parents that this was a common practice in the cult, *id.* at 17; (4) a friend of the daughter reported to the parents that during his visit with her she had not said a word to him; she "simply smiled vacantly and stared at him . . . 'glassy-eyed,'" *id.* at 11; (5) the former cult member reported:

One of the "religious" ceremonies used in the cult involved a number of members holding hands while sitting in a circle, one of them holding metal somehow attached to the room's electrical outlet. The current was turned on, causing it to run through the bodies of all those in the circle. One by one, members would leave the circle, increasing the current being endured by the remainder. The record as to the fewest number willing to so prove their faith was two, both of whom became frightened when they could not release each other's hands or the electrified piece of metal. A "religious" spectator had to remove the plug from the outlet.

Id. at 17-18.

197. See Note, *supra* note 4, 18 ARIZ. L. REV. at 1108.

198. *Id.* at 1108-09. But see *Katz v. Superior Ct.*, 73 Cal. App. 3d 952, 141 Cal. Rptr. 234 (1977).

B. *Deprogramming and the "Compulsion" Defense*

To decide whether defendants in deprogramming cases may successfully raise the proposed compulsion defense, courts should consider evidence similar to that presented under the choice of evils defense. The availability of the defense, however, depends not on the objective desirability of intervention, but on whether the defendant acted understandably. The fact-finder must ask whether individuals of ordinary firmness and respect for the law would behave similarly in the defendant's position.¹⁹⁹ This necessarily entails examining the identity of the defendant and the circumstances that affected him.

Parents whose children join cults will often have cause for concern about the child's well-being.²⁰⁰ In many cases, those close to the child witness sudden and radical changes in personality²⁰¹ and lifestyle, frequently accompanied by total rejection of his past. Cult members are often openly hostile to parents and former friends.²⁰² To help them to understand these changes,²⁰³ parents may turn to one of a growing number of anticult organizations.²⁰⁴ These organizations introduce parents to former cult members, parents of former members, and deprogrammers, many of whom urge that the child is in danger and must be protected from the cult.²⁰⁵ These factors, and the close relationship between a parent or friend and the cult member,²⁰⁶ may cause parents or friends to believe that intervention is

199. See text at note 115 *supra*.

200. See notes 175-77 & 183-85 and accompanying text.

201. See Clark, *supra* note 2, at 280 ("While in this state, personality changes drastically — a fact that often brings terrified parents into the physician's office."); Rudin, *supra* note 2, at 20 ("a complete personality transformation seems to occur"). But see Simmonds, *Conversion or Addiction: Consequences of Joining a Jesus Movement Group*, 20 AM. BEHAVIORAL SCI. 909 (1977).

202. See Shapiro, *supra* note 152, at 81.

203. It has been suggested that because of the emotional distress suffered by the parents of cult members, "they are desperately in need of support and understanding." Shapiro, *supra* note 152, at 81. See generally J. MACCOLLAM, *supra* note 2, at 83 ("Many families have seen strong and healthy parents reduced to physical or emotional cripples from the exhaustion and strain under which cult parents often live."); Delgado, *supra* note 4, at 29 (some parents "have suffered mental and physical illnesses as a result of the stress of forced separation from and concern over the welfare of a loved child").

204. See *History of the Deprogramming Movement*, in *Deprogramming: Documenting the Issue*, *supra* note 8, at 12 (suggesting that "a vast underground network of communications, referrals, transportation, and housing" to be used for deprogrammings has developed). But see J. MACCOLLAM, *supra* note 2, at 125 (responding to this allegation by suggesting that there is, at most, informal contact between these organizations).

It has been argued that contact is sometimes initiated by the organization, rather than by the parents. See *Step by Step Account of the Events Leading to the Procuring and Issuance of a Conservatorship*, in *Deprogramming: Documenting the Issue*, *supra* note 8, at 44.

205. *Id.* See Simmonds, *Deprogramming: The Wrong Answer for Concerned Parents*, in *Deprogramming: Documenting the Issue*, *supra* note 8, at 202.

206. Courts and commentators have recognized that the emotional pressures caused by a threat to an individual's child may be just as great as, if not greater than, those resulting from a

essential.²⁰⁷

Regardless of their motives, many parents will find the decision to deprogram one of the most difficult and stressful decisions of their lives.²⁰⁸ At least two courts have recognized the pressure that parents face. In rejecting a cult member's tort action for false imprisonment, a Rhode Island district court stated that "Mrs. Weiss' actions . . . arose not from her abhorrence of the Unification Church per se, but rather arose directly from a solicitude which a mother holds for her daughter's health and well-being."²⁰⁹ Similarly, in a Washington criminal deprogramming case, the court concluded that "the parents who would do less than what Mr. and Mrs. Crampton did for their daughter Kathe would be less than responsible, loving parents."²¹⁰ The Washington court's conclusion may seem overstated, but it is reasonable to conclude that many parents are likely to take socially undesirable actions on behalf of their children.

In considering the application of the compulsion defense to parents, courts should engage in a three-step inquiry. The initial requirement of an honest and reasonable belief in a threat of serious injury to the actor or someone close to the actor could be satisfied by evidence supporting a reasonable belief that the cult threatened the child's capacity for independent judgment or his physical health. But general evidence about cults does not provide a reasonable basis for inferring danger from a particular cult.²¹¹ Similarly, the fact that a child dropped out of school to join the cult, standing alone, should not support an inference of physical or psychological danger. Parents could satisfy the standard by demonstrating that they knew that the cult had engaged in practices jeopardizing physical or psychological well-being, or if contact with the child led them reasonably to perceive a risk of such harm.

If this first requirement is met, the court must determine whether the pressure was sufficient to overcome a reasonable person's resis-

threat directed at the individual. *See* *United States v. Garner*, 529 F.2d 962, 969-71 (6th Cir.), *cert. denied*, 426 U.S. 922 (1976); *United States v. Gordon*, 526 F.2d 406, 408 n.1 (9th Cir. 1975); *State v. Toscano*, 74 N.J. 421, 437, 378 A.2d 755, 763 (1977); *Hersey & Avins*, *supra* note 102, at 286.

207. The explanation for parents' actions may be more complicated. Several authorities suggest that parents feel a sense of guilt, and perhaps hostility, when their children reject them, their lifestyle, and their values. Rather than accepting their "failure," parents may rationalize that the cult has victimized their child. *See* *Robbins & Anthony*, *supra* note 159, at 81; *Sage*, *supra* note 188, at 45.

208. *See* *J. MACCOLLAM*, *supra* note 2, at 72. Besides requiring a large investment of time and money, *see* *Simmons*, *supra* note 205, parents risk criminal and tort liability, and, more realistically, permanently destroying their relationship with the child, *see* *Anthony*, *supra* note 128, at 86.

209. *Weiss v. Patrick*, 453 F. Supp. 717, 724 (D.R.I.), *aff'd.*, 588 F.2d 818 (1st Cir. 1978), *cert. denied*, 442 U.S. 929 (1979).

210. *United States v. Patrick*, No. CR74-320-5, slip op. at 78 (W.D. Wash. Dec. 11, 1974).

211. *See* text at note 191 *supra*.

tance. In analyzing this question, courts should consider both the interest threatened and the probability that the perceived harm would occur. The close relation between the defendant and the child suggests that low levels of pressure may overcome reasonable resistance.²¹² To assess the probability of the harm occurring, courts should again consider the information available to the parents, and distinguish between general evidence and evidence derived from contact with the child. If the parents rely on the former, courts could exclude the defense unless strong evidence suggested a threat. The mere possibility of some injury to the child should not overcome the resistance of a reasonable person.²¹³ However, if the parent's contact with the child suggests that the perceived risk is imminent (*e.g.*, the child appears incapable of independent judgment), the court should allow the jury to consider whether an ordinary person's resistance would have been overwhelmed.

Finally, if the court is convinced that the circumstances would have overcome an ordinary person's resistance, it should consider whether the defendant's action was excusable. Most parents do not hurriedly make the decision to deprogram; although their emotional state may prevent them from correctly assessing the child's situation, they do attempt to investigate alternatives to forcible abduction.²¹⁴ Unless there is evidence that the child's condition would have materially worsened without immediate action, an ordinary person in the parent's situation would make such an investigation. The investigation — if only consulting a lawyer — should reveal the availability of conservatorships as an alternative when such proceedings are available.

Consequently, the defense generally should not avail parents who did not inquire about or who simply ignored legal alternatives in a state where a guardianship/conservatorship proceeding is a viable alternative. Because guardianship proceedings are used only infrequently, however, the failure to pursue this option should not conclusively decide the issue. If the threat were particularly severe; emotionally upset parents might believe that intervention is essential

212. It is conceivable that in some cases a court could find lacking the necessary closeness between parents and an adult child to justify recognition of the compulsion defense. This might be the case, for example, if the parents and child had been separated for a long period of time. But as a general matter, it is reasonable to assume that parents will be sufficiently close to even adult children to justify recognition of the defense. This view is in accord with the authorities who suggest that harm posed to relatives is sufficient ground for recognition of the duress defense. See Hersey & Avins, *supra* note 102, at 286; Newman & Weitzer, *supra* note 32, at 323; Note, *Criminal Law — Duress — Standard for Duress Based Upon Person of Reasonable Firmness with Burden of Persuasion by Preponderance of Evidence Upon Defendant* — State v. Toscano, 74 N.J. 421, 378 A.2d 775 (1977), 9 SETON HALL L. REV. 556, 561 (1978).

213. Such a view is consistent with the traditional approach, which required a specific threat, rather than the possibility of some future harm. Even those cases that have urged an exception to this rule have based it on the high probability of the future harm occurring.

214. See, *e.g.*, F. CONWAY & J. SPIEGELMAN, *supra* note 155, at 83.

and yet be convinced that there is little chance of prevailing in court because of judicial reluctance to interfere with religion and the limited use of these proceedings in the past.²¹⁵ Additionally, if the parents obtained legal advice, but were not informed of this option, their involvement in deprogramming might be excusable.

There are circumstances in which parents, and perhaps close friends, could successfully assert the compulsion defense, but it usually would not exculpate other parties. Courts could reject other parties' attempts to assert the defense as a matter of law because the threat was not to someone close to the deprogrammer. While the natural bond between parents and children may prevent parents from making a socially rational decision, professional deprogrammers have no special circumstances that make their decisions so understandable. Instead of reacting like ordinary people, deprogrammers have distinguished themselves by deciding to take the law into their own hands.

CONCLUSION

More than sixty years ago, the Supreme Court replaced the rigid retreat requirement in self-defense cases with a rule providing that failure to retreat should only be considered as one factor in determining the reasonableness of a defendant's behavior.²¹⁶ Justice Holmes observed that such reform was necessary because the original cases developing the defense "had a tendency to ossify into specific rules without much regard for reason."²¹⁷ The process of ossification is again apparent in the development of the unitary approach to the necessity defense. The unhappy result of this process is the gulf that presently exists between the policies underlying necessity and the rules that define the defense. To further these policies more effectively and coherently, courts should adopt a dualistic approach.

The inadequacy of the traditional necessity defense is evident in the deprogramming cases. In these cases, courts should carefully consider the applicability of the policies justifying the defense. If deprogramming is clearly necessary to protect a cult member, and if there is no legal means to meet this necessity, then the choice of evils defense is applicable. If the pressures on the parents were so great that their irrational decision is "understandable," then the compul-

215. This does not mean that the perceived unwillingness of the courts to act would ordinarily be a reasonable basis for disregarding this option. However, given the diminished capacity of the defendant, a court might find that the defendant's refusal to rely on this alternative was understandable.

216. See Delgado, *Religious Totalism as Slavery*, 9 N.Y.U. REV. L. & SOC. CHANGE 51 (1980).

217. *Brown v. United States*, 256 U.S. 335, 343 (1921).

sion defense applies. But the rigid, and often unjustified, limitations that have been placed on the necessity defense have prevented courts from confronting the important questions that deprogramming cases raise.

Whether one views deprogramming as a rescue from slavery or as a gross intrusion on religious liberty, it is rather extraordinary that such an important decision has largely been left in private hands. Strong legislative decisions either for or against cults in the foreseeable future, however, are unlikely.²¹⁸ This inaction can be attributed to the clash between legislative reluctance to interfere with religion and legislative concern with the well-being of cult members, as well as to sympathy for the position of distraught parents. As long as legislatures are abdicating some authority to make these decisions to private individuals, it is essential that courts rationally supervise the way that this authority is exercised. Such a supervisory role can in part be performed through the reasonable application of the defenses of choice of evils and compulsion.

218. *See generally* N.Y. Times, May 22, 1981, at 10, col. 5 (discussing legislative actions that have been taken).